92-825

Supreme Court, U.S.
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No. 92-____

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

ANTHONY T. LEE, *et al.*,

Petitioners,

V.

TALLADEGA COUNTY BOARD OF EDUCATION, *et al.*,

AND

UNITED STATES OF AMERICA

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether -- contrary to the clear holding of this Court in *Board of Education of Oklahoma City Public Schools v. Dowell*, ___ U.S. ___, ___, 111 S. Ct. 630, 636 (1991) -- a district court's use of the term "unitary status" in an order dismissing a school desegregation case pursuant to the parties' stipulation, but not vacating or dissolving the existing injunctive decrees, "implicitly" dissolved all injunctive relief.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following persons were appellants in the court of appeals, individually and on behalf of all black children and their parents similarly situated:

Henry A. Lee, Detroit Lee, Hattie M. Lee, Palmer Sullins, Jr., Alan D. Sullins, Marsha Marie Sullins, Palmer Sullins, Della D. Sullins, Gerald Warren Billes, Heloise Elaine Billes, I.V. Billes, Willie M. Jackson, Jr., Mabel H. Jackson, Willie B. Wyatt, Jr., Brenda J. Wyatt, Willie B. Wyatt, Thelma A. Wyatt, Nelson N. Boggan, Jr., Nelson Boggan, Sr., Mamie Boggan, Willie C. Johnson, Jr., Brenda Faye Johnson, Dwight W. Johnson, Willie C. Johnson, Ruth Johnson, William H. Moore, Edwina M. Moore, L. James Moore, Edna M. Moore, Robert Judkins, Jr., Willie B. Wyatt, Jr., Patricia Jones, Shelby Chambliss, Carmen Judkins, Janice Carter, Ellen Henderson, Harvey Jackson, Wilmar Jones, John W. Nixon, Quintin Elston, Rhonda Elston, Tiffanie Elston, Augustus Elston, Cardella Elston, Ernest Jackson, Rayven Jackson, Rollen Jackson, Helen Jackson, Wendell Ware, John W. Ware, Jeffery Morris, Lela Morris, Vernon Garrett, Estella Garrett, Delicia Beavers, Loretta Beavers, Dorothy Beavers, Carla Jones, Paul Jones, Willie Jones, Bertha Jones, Leeorey Beavers, Ronnie Beavers, Stephanie Y. Hill, Connally Hill, Jacques Turner, William Tuck, Jr., Veronica Tuck, Danielle Jones, Donald Jones, Quinedell Mosley, Quinell Mosley, Kereyell Glover,

Delilah Glover, Tiffani Swain, Kedrick Swain, Terry Swain, Donyae Swain, Gwendolyn Swain, Darius Ball, Kierston Ball, Gwynethe Ball, Damien Garrett, Althea Garrett, Tonya Shepard, Mary Alice Jemison, Cora Tuck, Louise Tuck, Jerrk Evans, Kate Evans, Montina Williams, Richard Williams, Angie Williams, Roslyn Cochran, Johnnie Cochran, Quinton Morris, Datrea Morris, Torry Morris, Willie Morris.

In addition to the parties listed in the caption, the following persons and entities were appellees in the court of appeals:

Lance Grissett, Kenneth Armbrester, M. R. Watson, Gay Langley, Joseph Pomeroy, Larry Morris, Dan Limbaugh, Beulah Garrett, Cindy Allred.

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Petitioners,

V.

TALLADEGA COUNTY BOARD OF EDUCATION, *et al.*,

AND

UNITED STATES OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, a class of black schoolchildren and their parents in Talladega County, Alabama, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 15, 1992.

OPINIONS AND ORDERS BELOW

The June 15, 1992 opinion of the court of appeals is reported at 963 F.2d 1426 and is set out in the Appendix to this Petition (hereafter, "App."), *infra* 1a-14a. The August 13, 1992 order of the court of appeals denying rehearing is unreported (App. 32a-33a).

The district court's July 25, 1988 denial of Petitioners' Motion to Reopen (App. 15a-16a) and the accompanying Memorandum Opinion (App. 17a-19a) are unreported. The district court's March 13, 1985 entry and approval of a Joint Stipulation of Dismissal (App. 23a-28a) and accompanying Judgment and Order (App. 29a-31a) are also unreported.

JURISDICTION OF THIS COURT

The court of appeals issued its opinion and judgment affirming the district court's denial of Petitioners' Motion to Reopen this case (to enforce outstanding injunctive orders) on June 15, 1992 and denied Petitioners' timely application for rehearing on August 13, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

In *Board of Education of Oklahoma City Public Schools v. Dowell*, __ U.S. __, 111 S. Ct. 630, 636 (1991), and again in *Freeman v. Pitts*, __ U.S. __, 112 S. Ct. 1430, 1433-44 (1992), this Court acknowledged the confusion that flowed from the use of the term "unitary" to signal the end of a school desegregation case, and held that in order to terminate such a case a district court must find that the vestiges of the *de jure* system have been eliminated to the extent practicable. As the Court recognized, when a finding of unitariness is accorded constitutional dimension it carries enormous consequences and can seriously affect the ability of the courts and the black schoolchildren in their efforts to carry out the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954). *See Dowell*, __ U.S. at __, 111 S. Ct. at 636. In this case, the lower court -- contrary to the clear teachings of this Court -- inferred from facts virtually indistinguishable from those in *Dowell* that a reference to "unitary status" was sufficient to dispose of a case in its entirety and to eliminate all injunctive relief. This is not only contrary to *Dowell* and *Freeman*, but poses a threat to plaintiffs in school desegregation cases throughout the Eleventh Circuit and in other circuits as well.

Relevant Facts and Proceedings Below

This litigation, involving the Talladega County, Alabama school system, was originally commenced before a three-judge court in 1963 as part of the state-wide school

desegregation action.[1] The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343(3). On February 3, 1970, the court entered various injunctive orders, including orders restraining the Talladega County school district from approving student transfers to other school systems if the effect would be to diminish the level of desegregation, either in the Talladega County district or in the district to which the student transferred,[2] and prohibiting the use of temporary classrooms in a manner that reinforced the dual school system.[3]

On November 7, 1983, the school district filed a Motion for Court to Relinquish Jurisdiction, which it thereafter amended by adding, as an exhibit, a Resolution of the Board adopted on November 22, 1983. No action was taken on this motion until March 12, 1985, when the parties filed a Joint Stipulation of Dismissal which provided that

> the School System amended this Motion [for Court to Relinquish Jurisdiction] by filing a resolution of the Talladega County Board of Education, adopted November 22, 1983, which

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[1]See *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala.)(3-judge court), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967).

[2]See *Lee v. Eufala City Board of Education*, 573 F.2d 229 (5th Cir. 1978); *United States v. Lowndes County Board of Education*, 878 F.2d 1301 (11th Cir. 1989).

[3]On April 15, 1970, the three-judge court transferred the individual school systems that were the subject of the state-wide litigation to the respective federal judicial districts and divisions throughout Alabama in which they were located; the cases were assigned to single district judges for further proceedings. See *Lee v. Macon County Board of Education*, 448 F.2d 746, 748 n.1 (5th Cir. 1971).

> *commits the Board to maintaining a unitary, nondiscriminatory School System.* The Resolution is attached to this Stipulation as Exhibit A *and is incorporated herein.*

(App. 24a) (emphasis added). The parties agreed in the Joint Stipulation that dismissal of the action was appropriate "in view of the attached Resolution" (App. 24a). Neither the Stipulation nor the Resolution stated that outstanding injunctive decrees would be vacated or dissolved. In fact, the parties contemplated that the Board would continue to avoid practices that would perpetuate the dual system, as indicated by the incorporated Resolution which explicitly provides that the "Talladega County System shall be operated at all times so as to conform with . . . all previous orders of this Court . . ." (App. 27a).

On March 13, 1985, the district court "Approved" and "Entered" the Stipulation (App. 25a). On the same day, it issued a separate Judgment and Order, "pursuant to Fed.R. Civ.P. 54(b)" (App. 29a-31a), which the district judge subsequently described as a "redundancy," (App. 18a).[4] That order stated that the case was dismissed "[i]n view of" the Joint Stipulation of Dismissal (App. 29a), and that the school district had achieved "unitary status" (App. 30a). Like the Joint Stipulation and the Resolution, the separate Judgment and Order did not state that existing court decrees were vacated or dissolved.

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[4]The court of appeals ruled that "although labeled 'Judgment and Order,' [the Order] is not a judgment at all" (App. 14a). The court ruled that "[f]inal judgment in this case was entered against the TCBE in 1967 when the district court found that the Board was operating a racially segregated school system . . ." (App. 14a).

On July 22, 1988, Petitioners moved to reopen the case, seeking to enforce the court orders which they believed Respondents were violating (App. 15a-16a). Petitioners alleged a pattern of segregative and discriminatory actions by the Talladega County Board of Education after the 1985 dismissal, including racially discriminatory school closings and new construction by which the Board placed desegregated schools only in white communities, segregative use of temporary classroom facilities, and segregative inter-district transfers, all in violation of the outstanding court orders. In addition, plaintiffs challenged the Board's total failure to implement affirmative action programs with respect to faculty hiring as promised in the Resolution.[5]

On July 25, 1988, the district court denied the motion (App. 15a-16a). It stated that there were no injunctive orders remaining after dismissal of the case in 1985, and that there was no retention of jurisdiction that would permit the court to reopen the case or to grant relief from the order of dismissal (which the district court interpreted to have *ipso facto* extinguished all outstanding orders in the case) (App. 17a-19a); in other words, the court ruled that Petitioners had lost the benefit of the court orders entered for their protection by consenting to dismissal of the suit (although not to vacating or dissolving the orders) in 1985.[6] The district court ruled that Petitioners could challenge the

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[5]Plaintiffs' Memorandum of Points and Authorities in Support of Motion to Reopen, and Motions for a Preliminary Injunction and an Order Directing Compliance With Outstanding Court Orders and accompanying Exhibits filed July 22, 1988.

[6]In a subsequent order issued in August of 1988 denying Petitioner's Motion for an Injunction Pending Appeal, the district court ruled that the injunctive relief "necessarily" was vacated with the dismissal order (App. 22a).

school board's actions only by filing a new lawsuit and establishing a new federal Constitutional violation by again proving intentional discrimination (*see* App. 18a-19a).[7]

On June 15, 1992, the Court of Appeals for the Eleventh Circuit affirmed both the district court's refusal to reopen the case and its analysis of automatic or "implied" dissolution of injunctive decrees in school desegregation cases. The court's opinion states, in relevant part: "*By operation of law*, the orders enjoining the [School Board] were dissolved *when the district court declared that the school system had attained unitary status*." (App. 5a) (emphasis added). The court held that "[t]he attainment of unitary status means that school authorities have remedied their constitutional violation. . . . This finding *implicitly dissolved* the injunctions in effect at that time." (App. 8a) (emphasis added).

In sum, the court of appeals affirmed the order of the district court denying the motion to reopen, and ruled as a

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[7]Petitioners followed these directions and filed *Elston v. Talladega County Board of Education*, No. CV-88-H-2052-E (N.D. Ala.), which is pending on appeal before the Eleventh Circuit (No. 92-6033). However, Petitioners' rights are far from adequately protected by the opportunity to prosecute the new lawsuit. Under the ruling below, Petitioners have been stripped of their right to enforce valid orders which they obtained in the *Lee* litigation and which have never been withdrawn, such as the order barring inter-district transfers that increase the racial identifiability of a school. *See United States v. Lowndes County Board of Education*, 878 F.2d 1301 (11th Cir. 1989). As a result, despite a finding that a significant number of white students were obtaining interdistrict transfers to avoid a racially identifiable black school in Talladega County -- a clear violation of the court order -- the trial court denied relief. See Excerpt from Findings of Fact and Conclusions of Law, *Elston v. Talladega County Board of Education*, No. CV-88-H-2052-E (N.D. Ala., Sept. 19, 1989) (App. 34a-36a).

matter of law that the existing injunctive decrees were implicitly vacated when the district court used the term "unitary status" in connection with the dismissal in 1985. (App. 8a).

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of federal Constitutional law -- specifically, what is the proper manner in which injunctive decrees in school desegregation cases are to be vacated or dissolved -- contrary to the express holdings of this Court. The lower court proceeded to dispose of this case on the basis of a vague and clearly confused use of the term "unitary status." Correction of the error by this Court is imperative because the confusion it creates is likely to be repeated in the substantial number of similar cases still pending throughout the Eleventh Circuit and is necessary in order to carry out the mandate of *Brown v. Board of Education*.

A. The Ruling Below Directly Conflicts With Controlling Decisions Of This Court

In *Freeman v. Pitts*, ___ U.S. at ___, 112 S. Ct. at 1443, this Court stated:

> The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present. This was

the rationale and objective of *Brown I* and *Brown II*.

Since the *Brown* decisions, the courts have been faced with questions of remedy and more recently with the question of the appropriate manner to resolve a desegregation case. This Court has required an affirmative showing of good faith compliance with court orders and of the elimination of the vestiges of the dual system to the extent practicable. *Dowell*, ___ U.S. at ___, 111 S. Ct. at 638; *Freeman*, ___ U.S. at ___, 112 S. Ct. at 1446.

In 1985, when the case at bar was dismissed, neither the district court by order nor the parties by stipulation stated that the existing injunctive decrees were vacated or dissolved. Rather, the district court approved the parties' Joint Stipulation "in view of" the incorporated school board Resolution committing the board to continue to comply with those orders. The commitment reflected the parties expectation that the orders remained in effect.

The court of appeals' conclusion that the district court "*implicitly* dissolved" the existing decrees by characterizing the school system in a separate order as having attained "unitary status" is flatly inconsistent with this Court's holdings from *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) to *Board of Education of Oklahoma City Public Schools v. Dowell*, ___ U.S. ___, 111 S. Ct. 630, 636 (1991) and *Freeman v. Pitts*, ___ U.S. ___, 112 S. Ct. 1430, 1443-44 (1992). Indeed, the facts of *Dowell* are strikingly similar to those in the case at bar, but the results are directly contrary.

In *Dowell*, the district court entered an "Order Terminating Case" in 1977. The order recited that "substantial compliance with the constitutional requirements has been achieved" and that the school district was "unitary,"

but it did not vacate or dissolve injunctive decrees requiring implementation of a desegregation plan.[8] Plaintiffs did not appeal the 1977 order. *Dowell*, ___ U.S. at ___, 111 S. Ct. at 634.

In 1985, after the Oklahoma City school board abandoned the desegregation plan in the elementary grades, the *Dowell* plaintiffs moved to reopen the case. The district court's initial denial of this motion was reversed on appeal; on remand, the court again ruled against plaintiffs.[9] The district court held that the school system's "unitary status" in 1977 had not been altered by any new segregative act between then and 1985, even though the school district was no longer complying with the injunction. This ruling was again reversed by the court of appeals based on *Swift*.[10] *Dowell v. Board of Education of Oklahoma City Public Schools*, 890 F.2d 1483, 1498-99 (10th Cir. 1989), *rev'd*, ___ U.S. ___, 111 S. Ct. 630 (1991).

Although this Court rejected the applicability of the *Swift* requirement in order to vacate injunctive relief, it also rejected the notion that the use of the terms "unitary" or "unitary status" would be dispositive of the question whether

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[8]See App. 37a-39a [reprinting Order Terminating Case, *Dowell v. Board of Education of Oklahoma City*, No. CIV-9452 (W.D. Okla. Jan. 18, 1977)].

[9]The district court was instructed on remand to determine whether there were sufficiently "changed circumstances," under the test enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932), to warrant modification or dissolution of the earlier injunctive decree. *Dowell v. Board of Education of Oklahoma City*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

[10]See *supra* note 9.

school desegregation decrees should be withdrawn. "It is a mistake to treat such words as 'dual' and 'unitary' as if they were actually found in the Constitution. . . . We are not sure how useful it is to define these terms more precisely or to create subclasses within them." *Dowell*, ___ U.S. at ___, 111 S. Ct. at 636.[11]

In *Freeman*, the Court reemphasized its view of the limitations on the use of the term "unitary":

> It follows that we must be cautious not to attribute to the term a utility it does not have. The term "unitary" does not confine the discretion and authority of the District Court in a way that departs from traditional equitable principles.
>
> That the term "unitary" does not have fixed meaning or content is not inconsistent with the principles that control the exercise of equitable power. The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by the unlawful action.

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[11]The *Dowell* opinion noted that the lower federal courts had been ambiguous and inconsistent in their use of the terms "unitary," "unitary status," and "unitariness" as well as with respect to the consequences necessarily flowing from the use of those terms, and found the 1977 district court order in that case similarly unclear. ___ U.S. at ___, 111 S. Ct. at 636. It cited an earlier decision of the Court of Appeals for the Eleventh Circuit regarding the "confusion" about the meaning and significance of the terms. *Id.*, citing *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985)(decided after the dismissal order in the instant case).

112 S. Ct. at 1444.

In *Dowell*, the Court issued a clear ruling designed to eliminate the confusion fostered by the use of the term. The Court stated: "In *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424 (1976), we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. *If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court.*" *Dowell*, ___ U.S. at ___, 111 S. Ct. at 636 (emphasis added). Accordingly, the Court held that the 1977 "unitary" order "did not finally terminate the Oklahoma City school litigation," *id.*, and remanded the case so that the district court could determine whether *in 1985, when plaintiffs sought to reopen the suit*, there were any remaining vestiges of the prior dual system that could practicably be remedied. Only if the constitutional obligation of the school district to eliminate the vestiges of the *de jure* system to the extent practicable had been satisfied would dissolution of the underlying injunctive decrees be justified. *Id.* at ___, 111 S. Ct. at 638.[12]

It is precisely that inquiry -- in the face of Petitioners' allegations of post-1985 segregative and discriminatory actions by the school board -- which the courts below refused to undertake.[13] This result, wholly contrary to the "bright-line"

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[12]This Court ruled in both *Dowell* and *Freeman* that good-faith compliance with court orders was also a necessary prerequisite to dissolution of injunctive relief.

[13]Ironically, even though the court below delayed its decision in this case pending the announcement of the *Dowell* ruling (and requested the parties to submit supplemental briefs on its impact), it ultimately disregarded *Dowell*'s holding on the question here presented and found the words "unitary status" to be outcome-determinative.

rule fashioned in *Pasadena* and reiterated and amplified in *Dowell*, deprives Petitioners of the remedy that they earlier obtained in this action for the pervasive and long-maintained violation of their Fourteenth Amendment rights. Petitioners never consented to abandon these remedial measures,[14] and were never informed by the terms of any decree that they were being withdrawn. The direct conflict with this Court's ruling in *Dowell* is manifest. This injustice, and the need to preserve and enforce the binding effect of this Court's rulings upon the lower federal courts, require that a writ of certiorari

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[14]The court of appeals suggests that petitioners consented to a finding that the vestiges had been eliminated. In a footnote, the opinion states that the use of the term "unitary status" unambiguously meant that all vestiges of the dual system had been eliminated

> [i]n light of the parties' stipulation in 1985, upon which the district court relied, that the [School Board] "has complied in good faith" with all court orders and that "*there is not . . . any vestige of racial segregation remaining in the Talladega County System. . . .*"

(App. 8a n.3). In fact, the italicized quoted language is a statement *only* of the *School Board's* position:

> WHEREAS, *the Talladega County Board of Education has determined* that there is not now and has not been *since the adoption and installation of the desegregation plan of this system*, any vestige of racial segregation remaining in the Talladega County System . . . .

(App. 11a n.5) (emphasis added). Moreover, no party consented to dissolution of the injunctive relief and the Board committed itself to continue to comply with the court orders.

be granted in this case and the judgment below be reversed.[15]

B. The Ruling Below Will Affect Numerous Desegregation Cases That Are Still Pending In The Eleventh Circuit

As this Court recognized in *Dowell*, and the Court of Appeals for the Eleventh Circuit recognized in *Georgia State Conference of Branches*, 775 F.2d 1403, the term "unitary" has been used in an inconsistent and confusing manner in many of the pending cases. Failure to correct the erroneous ruling below at this time is likely to lead to its repetition in numerous other cases, thereby spawning additional appeals to the Court of Appeals for the Eleventh Circuit and to this Court.

A substantial number of school desegregation actions are still pending in the federal district courts within the Eleventh Circuit. In Georgia, for instance, as in Alabama, state-wide litigation involving a large number of school districts was brought.[16] In Florida, a significant number of suits remain pending.[17]

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[15]Indeed, the fundamental clash with this Court's *Dowell* ruling requiring a precise statement when injunctive decrees are being vacated or dissolved is so glaring that summary disposition is entirely appropriate.

[16]*See, e.g., United States & Ridley v. Georgia*, 428 F.2d 377 (5th Cir. 1970).

[17]*See, e.g., Bradley v. Pinellas County School Board*, 961 F.2d 1554 (11th Cir. 1992); *Jacksonville Branch, NAACP v. Duval County School Board*, 883 F.2d 945 (11th Cir. 1989).

The decision below, although inconsistent with other decisions of the same court of appeals[18] as well as with this Court's jurisprudence, may be applied as these cases approach the termination stages contemplated in *Freeman*. The decision below thus furthers the very confusion that this Court so recently sought to eliminate by enunciating a "bright line" rule in *Dowell* that requires a precise and explicit statement when an injunctive decree is being dissolved. This Court should correct the error now, before it is replicated and enlarged.

[18] *See, e.g., United States v. Board of Education of Jackson County*, 794 F.2d 1541, 1543 (11th Cir. 1986)("That school districts have become unitary, however, does not inevitably require the court to vacate the orders upon which the parties have relied in reaching that state.").

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

ANTHONY T. LEE, et al.,
Plaintiffs-Appellants,

United States of America, Plaintiff-
Intervenor, Appellee

National Education Association,
Inc., Plaintiff-Intervenor,

v.

TALLADEGA COUNTY BOARD OF EDUCATION,
LANCE GRISSETT, KENNETH ARMBRESTER,
M. R. WATSON, et al., Defendants-Appellees.

No. 88-7471.

United States Court of Appeals,
Eleventh Circuit.

June 15, 1992

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, Chief Judge, CLARK*, and SMITH**, Senior Circuit Judges.

TJOFLAT, Chief Judge:

See Rule 32-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

This is an appeal from an order of the United States District Court for the Northern District of Alabama denying the appellants' motion to reopen a school desegregation case so that the injunctive orders previously entered against the school system could be reinstated and enforced. Because we hold that the district court was without authority to reopen the case and that all relevant injunctions were dissolved in 1985, we affirm the district court's order.

I.

This case is part of a statewide class action brought in 1963 on behalf of black school children in Alabama to desegregate the public schools of that state. The appellee is the Talladega County Board of Education (the TCBE or the Board) which operates the Talladega County School System.[1] In 1967, the district court concluded that a dual school system based upon race was maintained and operated throughout the state. The court ordered statewide desegregation and directed each school system within the state to adopt a desegregation plan that met the standards set forth in the court's order. *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D.Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 422 (1967).

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[1]This case began in 1963 in the United States District Court for the Middle District of Alabama as a class action seeking to desegregate the public schools of Macon County, Alabama. The next year, the appellants amended their complaint to include every school district in Alabama. In 1970, the district court divided the case into separate parts, each involving a separate school district, and transferred these parts to the district court having territorial jurisdiction over them. This case, involving the Talladega County School System, was transferred to the Northern District of Alabama.

In response to the court's 1967 order, the TCBE proposed a desegregation plan. This plan, however, proved ineffective and the district court ordered the Board to submit a new plan for the 1970-71 school year. The district court approved the plan subsequently submitted, as supplemented and modified, on February 3, 1970. Court orders later in 1970 and in 1971 modified this plan still further.

On November 7, 1983, the TCBE filed a "Motion for Court to Relinquish Jurisdiction," contending that the school system had become unitary and asking the court to relinquish jurisdiction and control over it. The Board later amended its motion by filing a "Resolution," which it had adopted on November 22, 1983, stating that the Board would operate the school system "at all times so as to conform with the United States Constitution, laws passed by Congress, and all previous orders of th[e district c]ourt...." The resolution also declared that the TCBE had complied in good faith with all court orders, had eliminated all vestiges of prior discrimination, and had been operating a "totally integrated, unitary system" for many years.

On March 13, 1985, the district court approved a "Joint Stipulation of Dismissal" agreed to by all the parties. The joint stipulation incorporated the TCBE's resolution. That same day, the court also entered a "Judgment and Order" stating that, in view of the parties' joint stipulation, the case should be dismissed. The court declared that the Talladega County School System had achieved unitary status, entered final judgment in accordance with Fed.R.Civ.P. 54(b), and dismissed the case. The court, however, did not dissolve explicitly the injunctive orders that had been entered against the TCBE.

More than three years after the district court dismissed this action, on July 21, 1988, the appellants moved

the district court to reopen the case, to reinstate the injunctive orders previously entered against the TCBE, and to grant them additional equitable relief. The motion contained three main allegations: (1) that the TCBE had engaged in racial discrimination by closing schools in the black community, changing the names of schools named after black persons, and planning new construction to avoid assigning white students to an historically black school; (2) that the Board had implemented a transfer policy that allowed students to attend school out of their assigned attendance zones or districts, which resulted in segregation in contravention of outstanding court orders; and (3) that the Board had not implemented promised affirmative action plans for faculty and staff.[2] To remedy this situation, the appellants asked the court to reinstate the injunctions previously entered in the case and to enjoin the Board's "illegal" school closings, its construction of new schools, and its approval of inter- and intra-district transfers. Finally, the appellants asked the court to require the Board to implement affirmative action plans for faculty and staff.

The appellants argued that the district court had jurisdiction to reopen the case and enforce its earlier orders for several reasons. First, they noted that the district court had not vacated expressly the earlier injunctions; thus, they argued, the outstanding orders remained binding on the Board. Second, they argued that, as part of the stipulated dismissal of the case, the Board had agreed to abide by all outstanding court orders; therefore, the appellants were entitled to return to court to enforce this agreement. Finally, the appellants argued that the case should be reopened pursuant to Fed.R.Civ.P. 60(b)(5) because there

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[2]The merits of the appellants' allegations are not at issue in this appeal.

"ha[d] been a fundamental change in the legal predicates upon which [the] dismissal [wa]s based." In relation to this last point, the appellants argued that when the district court issued its order declaring that the Talladega County School System had achieved unitary status, that term was not interpreted to mean that a school system had eliminated the vestiges of its prior discrimination and, thus, did not signal that the litigation involving the school district had run its course.

On July 25, 1988, the district court denied the appellants' motion to reopen the case. The court stated that when it dismissed the case in 1985 "there was no retention of jurisdiction by th[e] court and there remained no residual injunction requiring Talladega County Board of Education to do or not to do anything." The whole point of the dismissal, the court noted, "was to require that any party who found the dismissal erroneous do something about it *then*." The court concluded that the appellants could obtain the relief they sought only by filing a new lawsuit.

This appeal followed. We affirm the district court's order.

II.

We first reject the appellants' contention that the court orders enjoining the TCBE, because they were never expressly vacated, remain enforceable even though the district court has declared that the Talladega County School System has attained unitary status and has dismissed the case. By operation of law, the orders enjoining the TCBE were dissolved when the district court declared that the school system had attained unitary status. This is so because the limited nature of a federal court's remedial powers as well as the fundamental limitations of federalism render continuing

federal judicial supervision of local school authorities incompatible with a finding of unitary status. *See Board of Educ. of Oklahoma City Pub. Schs. v. Dowell*, __ U.S. __, __, 111 S.Ct. 630, 637, 112 L.Ed.2d 715 (1991); *United States v. Overton*, 834 F.2d 1171, 1174 (5th Cir.1987).

Injunctive decrees in school desegregation cases were never intended to operate in perpetuity. *Dowell*, __ U.S. at __, 111 S.Ct. at 637. Rather, federal supervision of a local school authority that has operated a racially dual system is a temporary measure that should last only as long as necessary to remedy past racial discrimination. *Id.* The purpose of a school desegregation decree is to effect a *transition* from a school system tainted with state-imposed segregation to a racially nondiscriminatory school system. *See Brown v. Board of Educ.*, 349 U.S. 294, 301, 75 S.Ct. 753, 756, 99 L.Ed.2d 1083 (1955); *Green v. New Kent County School Bd.*, 391 U.S. 430, 436, 88 S.Ct. 1689, 1693, 20 L.Ed.2d 716 (1968).

We stress the temporary nature of federal judicial supervision over local school systems "because '[n]o single tradition in public education is more deeply rooted than local control over the operation of schools. *Milliken v. Bradley*, 418 U.S. 717, 741, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069 (1974) (*Milliken I*), and because no one's interest is furthered by subjecting the nation's educational system to 'judicial tutelage for the indefinite future.' *Dowell*, [__ U.S. at __, 111 S.Ct. at 638]." *Freeman v. Pitts*, __ U.S. __, __, 112 S.Ct. 1430, 1453, 118 L.Ed.2d 108 (1992) (Scalia, J., concurring). As the Supreme Court recently noted:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with

> it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.

Freeman, __ U.S. at __, 112 S.Ct. at 1445. *See also Dowell*, __ U.S. at ___, 111 S.Ct. at 637 ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."). Thus, the "end purpose" of every court that supervises the disestablishment of a racially dual school system "must be to remedy the [constitutional] violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Freeman*, __ U.S. at __, 112 S.Ct. at 1445.

When local school authorities demonstrate that they have complied in good faith with the district court's desegregation decree and that the vestiges of their prior illegal racial discrimination have been eliminated to the extent practicable -- in short, that their school system has attained unitary status -- the court should and must return control over their school system to the local school authorities. *Dowell*, __ U.S. at __, 111 S.Ct. at 636-38. This rule follows from the settled principle that the remedial authority of the federal judiciary "may be exercised only on the basis of a constitutional violation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971), and is limited to redressing the constitutional violation itself. *Freeman*, __ U.S. at __, 112 S.Ct. at 1445. *See also Dowell*, __ U.S. at __, 111 S.Ct. at 637 ("The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities.");

Milliken v. Bradley, 433 U.S. 267, 282, 97 S.Ct. 2749, 2758, 53 L.Ed.2d 745 (1977) ("federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation"). The attainment of unitary status means that the school authorities have remedied their constitutional violation. The transition to a racially non-discriminatory school system is complete and the federal judiciary's remedial authority has come to an end.

In the instant case, the district court found in March 1985 that the Talladega County School System had achieved unitary status.[3] This finding implicitly dissolved the injunctions in effect at that time. Accordingly, when the appellants repaired to the district court in July 1988 seeking "to enforce existing court orders" against the TCBE, the court correctly concluded that there were no existing court orders applicable to the TCBE.

III.

The appellants also argue that they are entitled to an order compelling the TCBE to comply with the desegregation orders previously entered in this case because the joint

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[3]The appellants assert that district court's use of the term "unitary status" in its order dismissing the case is ambiguous; thus, this court should remand this case to the district court for a determination as to whether the TCBE had complied in good faith with the original desegregation decree, and whether the vestiges of past discrimination had been eliminated to the extent practicable. In light of the parties' stipulation in 1985, upon which the district court relied, that the TCBE "has complied in good faith" with all court orders and that "there is not ... any vestige of racial segregation remaining in the Talladega County System," we find no ambiguity in the district court's use of the term "unitary status."

stipulation of dismissal, in view of which the district court dismissed this case, incorporated the TCBE's resolution of November 22, 1983 in which the Board stated that it would continue to operate the Talladega County School System "so as to conform with ... all previous orders of th[e district c]ourt." The appellants' argument raises the issue of whether limitations on the federal judiciary's equitable powers, *see supra* Part II, would preclude a federal court from enforcing such an agreement. We need not and do not decide this issue today, however, because we hold that the language in the TCBE's resolution cannot be read as creating any enforceable obligation.

We cannot construe the joint stipulation, as the appellants would have us construe it, as either a "settlement agreement" or a "consent decree."[4] The stipulation of

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[4]The Joint Stipulation of Dismissal states in its entirety:

> By order dated February 3, 1970, the Court required the Talladega County School System to implement a plan of desegregation designed to convert the System to a unitary school system. On November 7, 1983, the Talladega County School System filed a Motion for Court to Relinquish Jurisdiction which claims that the School System has made every effort to fully implement and comply with the orders entered in this case. Subsequently, the School System amended this Motion by filing a Resolution of the Talladega County Board of Education, adopted November 22, 1983, which commits the Board to maintaining a unitary, nondiscriminatory School System. The Resolution is attached to this Stipulation as Exhibit A and is incorporated herein.
>
> The parties have reviewed the Motion of the Talladega County School System and its operation
>
> (continued...)

dismissal is not a contract between the parties but merely an acknowledgement by the parties that the Talladega County School System had achieved unitary status and, thus, that the injunctions against the TCBE were due to be dissolved and the case dismissed. Moreover, incorporation of the TCBE's resolution did not create an enforceable contract; when the resolution is read as a whole[5] and in the context of the

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[4](...continued)

> under the orders entered in this case. It is agreed by all the parties that these orders have been implemented in a manner that is adequate for establishment of a unitary school system in Talladega County.
>
> In view of this agreement and in view of the attached Resolution, the parties conclude that dismissal of this cause of action, as it applies to the Talladega County School System, is appropriate at this time.

[5]The Resolution of the TCBE states in its entirety:

> WHEREAS the Talladega County Board of Education was made a party to and has been subject to the orders and decrees of the United States District Court for the Northern District of Alabama in Case No. CA 70-251-S, which is styled Anthony T. Lee, et al., plaintiffs, United States of America and National Educational Association, Inc., plaintiff-intervenors, versus Macon County Board of Education, et al., defendants and said Court entered an order requiring the total integration of all schools in the Talladega County System as to students and faculty, and
>
> WHEREAS the Talladega County Board of Education, in accordance with said order and all other directives and decrees of this Court and the laws and regulations of the United States of America

(continued...)

[5](...continued)

has complied in good faith and there now exists in the Talladega County School System a totally integrated, unitary system and such system has existed for many years, and

WHEREAS, the Talladega County Board of Education has determined that there is not now and has not been since the adoption and installation of the desegregation plan of this system, any vestige of racial segregation remaining in the Talladega County System and the Board is adopting this resolution in support of its motion asking the Court to enter an order relinquishing jurisdiction and control over the operation of the Talladega County System.

NOW THEREFORE, in support of and in furtherance of said motion, BE IT RESOLVED that:

1. The Talladega County System shall be operated at all times so as to conform with the United States Constitution, laws passed by Congress, and all previous orders of this Court and the following paragraphs of this Resolution are adopted subject to this policy.

2. The Talladega County Board and its officers and employees shall never adopt any policy or program, institute any practice or procedure, or make or carry out any decision for the purpose of discriminating against any persons by reason of race, color, or ethnic identification and the following paragraphs are adopted subject to this policy.

3. The primary goal, objective and policy of this Board and all officers and employees of this School District is and shall continue to be to provide the maximum educational opportunity that can be made available to every student in every school of the Talladega County District by the prudent, efficient and effective use of the resources available to this School District.

(continued...)

contemplated dismissal of the case, it is plain that it did n
create any obligation enforceable against the TCBE.

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[5](...continued)

4. Every member of this Board, and all officers and employees of the Talladega County System shall continue to adopt, maintain and implement affirmative action programs designed to improve racial integration among students, faculty and administrative staff of the School System.

5. One of the factors to be taken into consideration in determining the desirability of a proposed policy, program, practice, procedure or decision of the Talladega County System is whether its adoption and implementation will tend to enhance racial integration among students, faculty, and/or administrative staff of the System.

6. It shall be the policy and practice of the Talladega County Board, its officers and employees and all those connected with this System to review the policies, programs, practices, procedures and decisions of the Talladega County System, from time to time, to see whether they appear to be having an adverse effect upon racial integration among the students, faculty and/or administrative staff of the School System and, should such an effect be apparent, to determine whether and how the policy, program, practice, procedure or decision of the School System may be modified without substantially impairing its educational efficacy so as to eliminate or diminish such adverse effect.

7. The Talladega County Board of Education will earnestly and in good faith endeavor to maintain a unitary school system with the utmost harmony and good will among all students, faculty members and the populace of the areas of Talladega County served by this System.

The language of the resolution suggests that it merely represents the good faith aspirations of the TCBE to continue to obey the law. While the resolution proclaims that the Board will act in conformity with previous court orders, neither the resolution nor the stipulation mentions anything about a party returning to court to enforce the court orders. To the contrary, the documents state repeatedly and explicitly that the time has arrived for this case to end. Indeed, the resolution was adopted in support of the TCBE's motion "asking the Court to enter an order *relinquishing jurisdiction and control* over the operation" of the school system. (Emphasis added.) The sense of finality in the resolution is inconsistent with the notion that a party would enjoy the right to petition the court years later to enforce earlier court orders. Finally, we are at a loss as to why the TCBE would ask the court to relinquish jurisdiction and control if this meant only that the TCBE would indefinitely remain subject to federal court supervision. In sum, the district court did not, as the appellants claim, "refuse to implement its own order." There was nothing for the court to implement after the March 13, 1985 dismissal on a finding of unitary status.

IV.

The appellants' final argument on appeal is that the district court abused its discretion in refusing to grant them relief pursuant to Fed.R.Civ.P. 60(b)(5). This rule provides for relief from a final judgment where "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The appellants contend that if the effect of a declaration of unitary status is the automatic vacation of all outstanding court decrees, that was not the law when this case was dismissed, is contrary to the intent of the joint stipulation, and reflects such a change in the underlying

predicates upon which dismissal was granted as to warrant relief from the judgment under Fed.R.Civ.P. 60(b)(5).

The district court did not abuse its discretion in denying the appellants' requested relief. Final judgment in this case was entered against the TCBE in 1967 when the district court found that the Board was operating a racially segregated school system in violation of the Constitution. At that time, the court enjoined the Board from operating a dual system in the future. The court's March 1985 order merely recognized that the TCBE had done all that it had to do to be freed of the court's supervision and implicitly dissolved the injunctions that the court had imposed in 1967. The March 1985 order is not a final judgment within the purview of Rule 60; indeed, the order, although labeled "Judgment and Order," is not a judgment at all. Moreover, this order has no prospective application. Thus, rule 60(b)(5), which applies only to judgments that have prospective effect, is inapplicable. *See Cook v. Birmingham News*, 618 F.2d 1149, 1152 (5th Cir.1980).

V.

Based on the foregoing, we AFFIRM the district court's denial of the appellants' motion to reopen, to reinstate the injunctive orders against the appellee, and to grant the appellants further equitable relief.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
88 JUL 22 PM 1:41
U.S. DISTRICT COURT
N.D. OF ALABAMA
C.T. CLIVER, CLERK

ANTHONY T. LEE, ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor
and Amicus Curiae,

CIVIL ACTION
NO. 70-AR-0251-S

NATIONAL EDUCATION
ASSOCIATION, INC.,

(Talladega County)

Plaintiff-Intervenor,

vs.

MACON COUNTY BOARD OF
EDUCATION, ET AL.,

ENTERED
JUL 25 1988

Defendants,

TALLADEGA COUNTY BOARD OF
EDUCATION, LANCE GRISSETT,
DAN LIMBAUGH, M.R. WATSON,
GAY LANGLEY, JOSEPH POMEROY,
and LARRY MORRIS,

Defendants.

PLAINTIFFS' MOTION TO REOPEN, AND MOTIONS FOR PRELIMINARY INJUNCTION AND FOR AN ORDER DIRECTING COMPLIANCE WITH OUTSTANDING COURT ORDERS

Plaintiffs respectfully petition the Court to reopen the above-styled case to enforce existing court orders and to grant them preliminary injunctive relief, as prayed for herein.

* * *

DENIED

/s/ WILLIAM M. ACKER, JR. JULY 25,1988

JUDGE **DATE**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANTHONY T. LEE, ET AL.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor
and Amicus Curiae,

CIVIL ACTION NO.

70-AR-0251-S

NATIONAL EDUCATIONAL ASSOCIATION, INC.,

(TALLADEGA COUNTY)

Plaintiff-Intervenor,

VS.

ENTERED
JUL 25 1988

MACON COUNTY BOARD OF EDUCATION, ET AL.,

Defendants

MEMORANDUM OPINION

The predominant motive for the parties having sought and obtained the order which was entered by this court on March 15, 1985, was the parties' recognition of the jurisprudential principle that litigation, even including permanent injunctions with ostensibly unending reporting

requirements, must eventually come to an end. On March 15, 1985, this court formally dismissed this action, by consent of the parties, as against Talladega County Board of Education. The finding under Rule 54(b), F.R.Civ.P., was a redundancy, but made it perfectly clear, if it were not already clear, that this case was in all respects concluded as to Talladega County Board of Education, and that any party who disagreed with that conclusion had only the options of filing a post-judgment motion pursuant to Rule 59 or Rule 60, F.R.Civ.P., or taking an appeal to the Eleventh Circuit.

Plaintiffs who unequivocally consented to the order of March 15, 1985 now purport to move to reopen the case "to enforce existing court orders." There are no "existing court orders" in this case applicable to Talladega County Board of Education. The whole point of the dismissal of March 15, 1985, was to require that any party who found the dismissal erroneous do something about it then. On March 15, 1985, there was no retention of jurisdiction by this court and there remained no residual injunction requiring Talladega County Board of Education to do or not to do anything. After March 15, 1985, any violation of statutory or constitutional law by Talladega County Board of Education became the subject of a new and separate complaint.

Plaintiffs invoke neither Rule 59, F.R.Civ.P., nor Rule 60, F.R.Civ.P., because neither rule is available under the allegations made by plaintiffs, who conspicuously are not joined by plaintiff-intervenor, United States of America. Without invoking any procedural rule, plaintiffs ask that this case as to Talladega County Board of Education be resurrected from the dead.

The order of March 15, 1985, was, of course, not intended to give Talladega County Board of Education a license in the future to violate the principles announced in

Brown v. Board of Education and its progeny. It did, however, finally adjudicate the Board of Education's compliance with *Brown v. Board of Education* **up to March 15, 1985**. What Talladega County Board of Education has done or has failed to do to comply with the requirements of *Brown v. Board of Education* after March 15, 1985 must be addressed in a separate proceeding brought by a person or persons with standing to bring it.

The court finds it interesting that plaintiffs have indicated their intent to perfect timely appeals from recent similar orders of dismissal as to one or more other public educational entities previously under the injunctive supervision of this court. If plaintiffs can obtain the relief they now seek against Talladega County Board of Education three years after a final order of dismissal, current appeals from similar orders would seem to be unnecessary.

Appropriate separate orders will be entered. In light of the foregoing, the orders are obviously without prejudice to the presentation of the same matters in a new, separate complaint.

DONE this 25th day of July, 1988.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANTHONY T. LEE, ET AL.,

Plaintiffs

UNITED STATES OF AMERICA,

Plaintiff-Intervenor
and Amicus Curiae,

CIVIL ACTION NO.
70-AR-0251-S

NATIONAL EDUCATION
ASSOCIATION, INC.,

(TALLADEGA
COUNTY)

Plaintiff-Intervenor,

VS.

MACON COUNTY BOARD OF
EDUCATION, ET AL.,

Defendants,

ENTERED
AUG 01 1988

TALLADEGA COUNTY BOARD OF
EDUCATION, LANCE GRISSETT,
DAN LIMBAUGH, M. R. WATSON,
GAY LANGLEY, JOSEPH POMEROY,
and LARRY MORRIS,

Defendants

ORDER

The court has been informed that plaintiffs have taken an appeal from the order of July 25, 1988. The court has for consideration plaintiffs' motion for an injunction pending that appeal.

Pursuant to Rule 62(c), F.R.Civ.P., this court "may, in its discretion . . . grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." By separate order, the court will deny plaintiffs' motion for an injunction pending appeal for the following three separate and several reasons:

1. If, as this court held on July 25, 1988, it was without jurisdiction to entertain an untimely post-judgment motion, it is equally without jurisdiction to consider this motion.

2. To enjoin the construction of a proposed new school building with construction expected to begin in August, 1988, would not only require a serious hearing on the question of the probability of appellate success by plaintiffs, but at the very least it would require the posting of a very sizeable injunction bond in order to protect Talladega County Board of Education in the event such an interim injunction should prove erroneous.

3. Plaintiffs' assertion that "the filing of a new action, as suggested by the court in denying plaintiffs' motions, will not adequately protect plaintiffs in that it denies them the protection of the outstanding court orders"

presupposes the existence of outstanding court orders applicable to Talladega County Board of Education. This is the very question which was addressed by the order of July 25, 1988. The action as against Talladega County Board of Education was dismissed by consent in 1985. This necessarily meant, and still means, that there are no "outstanding court orders" in the above-entitled cause applicable to Talladega County Board of Education. A separate complaint seeking temporary or preliminary injunctive relief, contrary to plaintiffs' assertion, would afford plaintiffs an adequate opportunity for the protection here being sought by plaintiffs. By not availing themselves of the opportunity suggested by the court, the plaintiffs may be risking the bar of laches.

DONE this 30th day of July, 1988

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
March 12, 1985
United States District Court
Northern District of Alabama
James E. Vandegrift, Clerk

ANTHONY T. LEE, ET AL.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor and Amicus Curiae,

NATIONAL EDUCATION ASSOCIATION, INC.,

Plaintiff-Intervenor,

VS.

MACON COUNTY BOARD OF EDUCATION, ET AL.,

Defendants.

CA 70-251-S

(Talladega County School System)

JOINT STIPULATION OF DISMISSAL

By order dated February 3, 1970, the Court required the Talladega County School System to implement a plan of desegregation designed to convert the System to a unitary school system. On November 7, 1983, the Talladega County School System filed a Motion for Court to Relinquish Jurisdiction which claims that the School System has made every effort to fully implement and comply with the orders

entered in this case. Subsequently, the School System amended this Motion by filing a Resolution of the Talladega County Board of Education, adopted November 22, 1983, which commits the Board to maintaining a unitary, nondiscriminatory School System. The Resolution is attached to this Stipulation as Exhibit A and is incorporated herein.

The parties have reviewed the Motion of the Talladega County School System and its operation under the orders entered in this case. It is agreed by all parties that these orders have been implemented in a manner that is adequate for establishment of a unitary school system in Talladega County.

In view of this agreement and in view of the attached Resolution, the parties conclude that dismissal of this cause of action, as it applies to the Talladega County School System, is appropriate at this time.

Respectfully submitted,

/s/ Joseph D. Rich
Joseph D. Rich
Angela Schmidt
Attorneys for the United States

/s/ Solomon S. Seay, Jr.
Solomon S. Seay, Jr.
Attorney for Plaintiffs and
Plaintiff-Intervenor, the
National Education Association, Inc.

/s/ Ralph Gaines
Ralph Gaines
Attorney for Defendant

Approved this 13th day of March, 1985

/s/ William M. Acker, Jr.
UNITED STATES DISTRICT JUDGE

A True Copy
James E. Vandegrift, Clerk
United States District Court
Northern District of Alabama

ENTERED
MAR 13 1985

BY:/s/Martha M. McGill
DEPUTY CLERK

EXHIBIT "A"

RESOLUTION

WHEREAS the Talladega County Board of Education was made a party to and has been subject to the orders and decrees of the United States District Court for the Northern District of Alabama in Case No. CA 70-251-S, which is styled Anthony T. Lee, et al, plaintiffs, United States of America and National Education Association, Inc., plaintiff-intervenors, versus Macon County Board of Education, et al, defendants and said Court entered an order requiring the total integration of all schools in the Talladega County System as to students and faculty, and

WHEREAS the Talladega County Board of Education, in accordance with said order and all other directives and decrees of this Court and the laws and regulations of the United States of America has complied in good faith and there now exists in the Talladega County School System a totally integrated, unitary system and such system has existed for many years, and

WHEREAS, the Talladega County Board of Education has determined that there is not now and has not been since the adoption and installation of the desegregation plan of this system, any vestige of racial segregation remaining in the Talladega County System and the Board is adopting this resolution in support of its motion asking the Court to enter an order relinquishing jurisdiction and control over the operation of the Talladega County System.

NOW THEREFORE, in support of and in furtherance of said motion, BE IT RESOLVED that:

1. The Talladega County System shall be operated at all times so as to conform with the United States Constitution, laws passed by Congress, and all previous orders of this Court and the following paragraphs of this Resolution are adopted subject to this policy.

2. The Talladega County Board and its officers and employees shall never adopt any policy or program, institute any practice or procedure, or make or carry out any decision for the purpose of discriminating against any person by reason of race, color, or ethnic identification and the following paragraphs are adopted subject to this policy.

3. The primary goal, objective and policy of this Board and all officers and employees of this School District is and shall continue to be to provide the maximum educational opportunity that can be made available to every student in every school of the Talladega County District by the prudent, efficient and effective use of the resources available to this School District.

4. Every member of this Board, and all officers and employees of the Talladega County System shall continue to adopt, maintain and implement affirmative action programs designed to improve racial integration among students, faculty and administrative staff of the School System.

5. One of the factors to be taken into consideration in determining the desirability of a proposed policy, program, practice, procedure or decision of the Talladega County System is whether its adoption and implementation will tend to enhance racial integration among students, faculty, and/or administrative staff of the System.

6. It shall be the policy and practice of the Talladega County Board, its officers and employees and all those

connected with this System to review the policies, programs, practices, procedures and decisions of the Talladega County System, from time to time, to see whether they appear to be having an adverse effect upon racial integration among the students, faculty and/or administrative staff of the School System and, should such an effect be apparent, to determine whether and how the policy, program, practice, procedure or decision of the School System may be modified without substantially impairing its educational efficacy so as to eliminate or diminish such adverse effect.

7. The Talladega County Board of Education will earnestly and in good faith endeavor to maintain a unitary school system with the utmost harmony and good will among all students, faculty members and the populace of the areas of Talladega County served by this System.

I hereby certify that the foregoing Resolution was adopted at a regular meeting of the Talladega County Board of Education held in Talladega, Alabama, on the 22nd day of November, 1983.

/s/ Lance D. Grissett
Secretary to the Board

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANTHONY T. LEE, et al.

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor
and Amicus Curiae,

NATIONAL EDUCATION ASSOCIATION, INC.,

Plaintiff-Intervenor,

CA 70-251-S

(Talladega County School System)

VS.

MACON COUNTY BOARD OF EDUCATION, et al.

Defendants.

ENTERED
MAR 13 1985

JUDGMENT AND ORDER

The parties have submitted to this Court a Joint Stipulation of Dismissal. In view of this submission, it is appropriate that the above captioned case should be dismissed.

In accordance with Fed. R. Civ. P. 54(b), the Court finds that there is no just reason for delay in the entry of final

judgment against this Defendant and the Court therefore expressly orders that judgment be entered in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Talladega County School System has achieved a unitary status and this case, as it applies to the Talladega County School System, is due to be, and hereby is dismissed.

Done this 13th day of March, 1985.

/s/ William M. Acker, Jr.
UNITED STATES DISTRICT JUDGE

Approved:

/s/ Joseph D. Rich
Joseph D. Rich
Angela Schmidt
Attorneys for the United States

/s/ Solomon S. Seay, Jr.
Solomon S. Seay, Jr.
Attorney for Plaintiffs and
Plaintiff-Intervenor, the
National Education Association,
Inc.

/s/ Ralph Gaines
Ralph Gaines
Attorney for Defendant

A TRUE COPY
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: /s/Martha H. McGill
DEPUTY CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-7471

ANTHONY T. LEE, et al.,
Plaintiff-Appellant,
UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee,
NATIONAL EDUCATION ASSOCIATION, INC.
Plaintiff-Intervenor,
versus
TALLADEGA COUNTY BOARD OF EDUCATION, et al,
Defendant-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, CLARK, and SMITH*, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

*Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

AUG 13, 1992

MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

[EXCERPT]

QUINTIN ELSTON, ET AL.,

PLAINTIFFS,

VS. CV88-H-2052-E

TALLADEGA COUNTY BOARD OF EDUCATION, ET AL.,

DEFENDANTS.

ENTERED
SEP 19 1989

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This action was tried before the court, without the aid of a jury, on August 21, 22 and 23, 1989. The matter is now under submission and the court herein sets forth its findings of fact and conclusions of law.

* * *

30. Significant numbers of white students who reside within the Talladega County Training School zone attend public schools in the Talladega City School system. This has occurred for many years and occurred long before the March 13, 1985 "unitary" order.

31. Dr. Grissett has not contacted school officials of the Talladega City School system in an effort to stop it from accepting into its system children who reside in the Talladega County Training School zone.

* * *

33. On April 19, 1979, the Justice Department notified counsel who represented both the Talladega City Board of Education and the Talladega County Board of Education that the Talladega City School system was governed by a provision in its school desegregation order that it should not consent to transfers where the cumulative effect would reduce desegregation in either district.

34. As required by state law, defendants have transferred school records of students leaving the Talladega County School system after they have enrolled in the Talladega City School system.

* * *

36. Defendants are aware of zone-jumping by white and black students alike. Many of the white students are likely avoiding historically black Talladega County Training School.

* * *

22. The extent of the "zone-jumping" in which Talladega County students are attending Talladega City or Sylacauga City schools is not known, but it involves a significant number of students, most of which are white but some of which are black.

* * *

DONE this 19th day of September, 1989.

/s/ JAMES H. HANCOCK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-9452

ROBERT L. DOWELL, ETC., *et al.*,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE
OKLAHOMA CITY PUBLIC SCHOOLS, ETC., *et al.*,

Defendants.

[Filed Jan. 18, 1977]

ORDER TERMINATING CASE

There is now pending before the Court a Motion by the defendant to close the case. A hearing has been conducted by the Court to receive the evidence of both plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools.

The Court has carefully reviewed this evidence and all of the reports it has received from the defendant and the Biracial Committee since the inception February 1, 1972 of "A New Plan of Unification for the Oklahoma City Public School System," commonly known as the Finger Plan. The Court has concluded that this was indeed a Plan that worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under

the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the Court.

Constitutional principles so bitterly contested by former members of the Board have now become a part of the fabric of the present school administration. The only standard ever imposed by the Court has been obedience to the Constitution. The School Board, as now constituted, has manifested the desire and intent to follow the law. The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.

Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. The Court believes and trusts that never again will the Board become the instrument and defender of racial discrimination so corrosive of the human spirit and so plainly forbidden by the Constitution.

ACCORDINGLY, IT IS ORDERED:

1. The Biracial Committee established by the Court's Order of December 3, 1971, which has been an effective and valued agency of the Court in the implementation of the Plan, is hereby dissolved;

2. Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal.

Dated this 18th day of January, 1977.

/s/ Luther Bohanon
United States District Judge

(2)

Supreme Court, U.S.
FILED
DEC. 14 1992
OFFICE OF THE CLERK

No. 92-825

In The

Supreme Court of the United States

October Term, 1992

ANTHONY T. LEE, *et al.*,

Petitioners,

v.

TALLADEGA COUNTY BOARD OF EDUCATION, *et al.*,

and

UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSTION

GEORGE C. DOUGLAS, JR.
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QUESTIONS PRESENTED

Petitioners' statement of the issue incorrectly implies that the Court of Appeals affirmed the District Court's refusal to reopen this case based on the mere term "unitary status", instead of a careful and reasoned review of the underlying case itself.

No issue arises under this Court's holding in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. ___, 112 L.Ed.2d 715, 111 S.Ct. 630 (1991). That case held that dismissal of a desegregation case is appropriate, along with dissolution of the desegregation decrees which were entered, upon a finding that a school board has ". . . complied in good faith with the desegregation decree since it was entered, and [that] the vestiges of past discrimination [have] been eliminated to the extent practicable." 112 L.Ed.2d at 729.

Because the plaintiffs *consented* to such a finding in this case, and the Court of Appeals affirmed on that basis, no issue arises under *Dowell*, a case in which unitary status and dismissal was contested.

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STATEMENT OF THE CASE

Misstatements Of Fact And Law:

In their statement of the case, the plaintiffs incorrectly say that the facts of this case are "virtually indistinguishable from those in *Dowell*". But in *Dowell* dissolution of the decree was contested, 112 L.Ed.2d at 723, whereas here the plaintiffs *consented* to a joint stipulation for dismissal in 1985 which said "it is agreed by all parties that these orders have been implemented in a manner that is adequate for establishment of a unitary school system in Talladega County." (App. 24a, Pet. for Cert.)

Petitioners' statement of the case also incorrectly implies that the Court of Appeals affirmed the District Court's 1988 refusal to reopen the case simply because the 1985 dismissal used the term "unitary". In fact the Court of Appeals conducted a thorough review of all the 1985 settlement documents, including the joint stipulation of dismissal, the school board's resolution, and the District Court's 1988 order refusing to reopen the case. *Lee v. Talladega County Board of Education*, 963 F.2d 1426, 1430-32 (11th Cir. 1992). In footnote 3 of its opinion, the Court of Appeals said:

> "In light of the parties' stipulation in 1985, upon which the district court relied, that the TCBE 'has complied in good faith' with all court orders and that 'there is not . . . any vestige of racial segregation remaining in the Talladega County System,' we find no ambiguity in the district court's use of the term 'unitary status.' ".

The Court of Appeals went on to note that

> " . . . the documents state repeatedly and explicitly that the time has arrived for this case to end.

> Indeed, the resolution was adopted in support of the TCBE's motion 'asking the Court to enter an order *relinquishing jurisdiction and control* over the operation of the school system'. [emphasis in original] The sense of finality in the resolution is inconsistent with the notion that a party would enjoy the right to petition the Court years later to enforce earlier court orders."

963 F.2d at 1432.

Petitioners attempt to buttress their claims here with selected excerpts from *Elston v. Talladega County Board of Education*, No. CV-88-H-2052-E (N.D. Ala.) [Petition, p.7, footnote 7, and App. 34a-36a]. However, Petitioners' footnote 7 and the excerpts from *Elston* which they have included in their appendix seriously misstate the District Court's findings in that case, which are reproduced fully in Respondents' Appendix here.

In summary, the District Court in *Elston* found that the Talladega County Board of Education was acting in compliance with the law, has " . . .moved forward to improve the quality of education offered to all of its students since March 13, 1985" and " . . . articulated and established by clear and convincing evidence substantial, legitimate, non-discriminatory reasons for the decisions and practices in question." (App. A-18 and A-21). Thus Petitioners' claim that the trial court in *Elston* denied them relief for a "clear violation of the court order" is a serious misstatement of the trial court's findings of fact and conclusions of law.

SUMMARY OF ARGUMENT

The plaintiffs and Petitioners here consented to dismissal of the Talladega County Board of Education from this case in 1985, executing a Joint Stipulation For Dismissal which said

> "The parties have reviewed the Motion of the Talladega County School System and its operation under the orders entered in this case. It is agreed by all parties that these orders have been implemented in a manner that is adequate for establishment of a unitary school system in Talladega County.
>
> In view of this agreement and in view of the attached resolution, the parties conclude that dismissal of this cause of action, as it applies to the Talladega County School System, is appropriate at this time."
>
> Appendix to Petition, p. 24a.

With this express acknowledgement by the plaintiffs that the Board was due to be dismissed, it is hardly surprising that the District Court refused to "reopen" the case in 1988. Had there been any "vestige of past discrimination" remaining in the Talladega County School System at the time it was dismissed in 1985, it is certainly reasonable to suppose that the plaintiffs would have brought that to the attention of the Court *then*, and refused to consent to the Board's dismissal. The absence of any such complaints *at the time* should be conclusive on the issue of whether the Board was entitled to be dismissed from the case in 1985.

No issue in this case arises under *Dowell,* which arose from the contested dismissal of a school board where the order dismissing the case was not clearly final. In this case however, it was clear to all parties at the time, including the plaintiffs, that the Board was being dismissed, and the Court of Appeals so found. (" . . . neither the resolution nor the stipulation mentions anything about a party returning to court to enforce the court orders. To the contrary, the documents sate repeatedly and explicitly that the time has arrived for this case to end.) 963 F.2d at 1432.

There is no error in the ruling below and the petition for certiorari should be denied.

ARGUMENT

When does a desegregation case end? This Court gave the answer in *Dowell:*

> "Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.' " [citing *Milliken v. Bradley,* 433 U.S. 267, 280-82 (1977)]
>
> "The District Court should address itself to whether the Board had complied in good faith

> with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."
>
> 112 L.Ed.2d at 729.

As the Court of Appeals noted in footnote 3 of its opinion, 963 F.2d at 1430, the plaintiffs and petitioners here acknowledged and stipulated in 1985 that the Talladega County Board of Education *had* complied in good faith with all court orders and that there was no vestige of segregation remaining in the Talladega County System.

Seeking to avoid the effect of this holding, Petitioners claim in footnote 14 of their petition (Petition p. 13) that this was "a statement only of the school board's position". But one may rightfully ask, if there *was* any vestige of segregation or discrimination remaining in the Talladega County System at the time of the 1985 consent dismissal, why did the plaintiffs consent, and why was that "vestige" not brought to the attention of the district court *at the time*? Moreover, if there was any such vestige of discrimination or segregation, why on earth would the plaintiffs have allowed a resolution stating that no such vestige did exist to be attached to their *joint* stipulation for dismissal?

The district court's 1988 refusal to reopen this case and its treatment of the 1985 dismissal was perfectly consistent with this Court's opinion in *Dowell*. The 1985 dismissal was a clear acknowledgement by all parties – school board, plaintiffs and the United States – that the case was *over*. As the District Court remarked in its July 25, 1988 memorandum opinion refusing to reopen the case,

> "The predominant motive for the parties having sought and obtained the order which was entered by this court on March 15, 1985 was the parties' recognition of the jurisprudential principle that litigation, even including permanent injunctions with ostensibly unending reporting requirements, must eventually come to an end. On March 15, 1985 this Court formally dismissed this action, by consent of the parties, as against Talladega County Board of Education. The finding under Rule 54(b) . . . was a redundancy, but made it perfectly clear, if it were not already clear, that this case was in all respects concluded as to Talladega County Board of Education . . .
>
> . . . The whole point of the dismissal of March 15, 1985 was to require that any party who found the dismissal erroneous do something about it *then*. . . . After March 15, 1985, any violation of statutory or constitutional law by Talladega County Board of Education became the subject of a new and separate complaint."
>
> Appendix to Petition, pp. 17a-18a.

The thrust of this holding by the district court in 1988 is remarkably consistent with this Court's 1991 holding in *Dowell* that, if a Board is entitled to have the decree terminated as the result of past good faith compliance and elimination of vestiges of past discrimination, then subsequent actions must be evaluated under appropriate equal protection principles. 112 L.Ed.2d at 729-730.

It is clear that what the plaintiffs are actually seeking is to avoid the burden of proof on the issue of intentional discrimination which they would have in a new action.

Justice Scalia anticipated this question in *Freeman v. Pitts*, 503 U.S. ___, 118 L.Ed.2d 108 (1992), when he said

> "We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: That plaintiffs alleging Equal Protection violations must prove intent and causation and not merely the existence of racial disparity, . . . that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, . . . and that it is 'desirable' to permit pupils to attend schools nearest their homes."
>
> 118 L.Ed.2d at 144 (citations omitted).

In this particular case the Court of Appeals held that the plaintiffs themselves had acknowledged this time had come, because they acknowledged in 1985 that the Talladega County Board of Education had done all it could do to eliminate vestiges of past discrimination. 963 F.2d at 1432, 1433.

In footnote 7 of their petition (p. 7) the Petitioners claim that they have " . . . been stripped of their right to enforce valid orders which they obtained in the *Lee* litigation . . . ". But this claim is simply another way of attempting to avoid *Dowell's* refusal to subject school systems to " . . . judicial tutelage for the indefinite future". (112 L.Ed.2d at 729).

The Petitioners grudgingly acknowledge *Dowell's* holding that dissolution of the underlying injunctive decrees is justified once a school district has met its constitutional obligation to eliminate the vestiges of de jure segregation. Petition p.12 citing *Dowell* at 111 S.Ct.

638. In spite of this, the Petitioners stubbornly refuse to acknowledge that they consented in 1985 to a finding that the Talladega County Board of Education had in fact met its constitutional obligation. They should not now be permitted to repudiate that acknowledgement and consent dismissal.

Finally, the Petitioners *claim* that the Court of Appeals' ruling " . . . will affect numerous desegregation cases" still pending in the Eleventh Circuit. But they make no showing whatsoever that any of those cases are factually similar to this, i.e., that they involve cases where the plaintiffs *consented* to a finding of unitary status and dismissal of the particular school board. Accordingly, this claim should also be rejected by this Court because it is unsupported by any factual showing from the Petitioners.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE C. DOUGLAS, JR.
Counsel of Record
for Respondents

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

QUINTIN ELSTON, ET AL., PLAINTIFFS, VS. TALLADEGA COUNTY BOARD OF EDUCATION, ET AL., DEFENDANTS.	)	CV88-H-2052-E (Filed Sep 19, 1989)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was tried before the court, without the aid of a jury, on August 21, 22 and 23, 1989. The matter is now under submission and the court herein sets forth its findings of fact and conclusions of law. Pursuant to the Pretrial Order, counsel for the parties filed with the court on August 11, 1989 a statement of agreed and disputed facts. The court's findings of fact and conclusions of law are basically addressed to the proposed facts contained in that document in the order and under the headings set forth therein.

Stipulated Facts

In 54 separately numbered paragraphs the parties stipulated a number of facts and each of those stipulated facts are accepted by the court as facts for the purposes of this action. The court does, however, note that at least

one of those stipulated facts may not be correct but any error is relatively immaterial. In paragraph 13 of the stipulated facts, counsel stipulated that defendants' plan for the students currently residing in Jonesview and Talladega County Training School zones to attend Talladega County Training School for grades 7 through 12. Defendant Lance Grissett has such plan and will recommend such to the Board of Education but the Board of Education has not formally approved such plan.

Plaintiffs' proposed factual findings

In 44 separately numbered paragraphs counsel for plaintiffs presented to the court proposed factual findings. The court will now set forth, using the same paragraph numbers, some of its findings of fact and conclusions of law germane to each proposed factual finding. The failure to include the language or the "facts" as proposed by counsel for plaintiffs could generally be viewed as a determination by the court that the proposed language or "facts" have not been established or are embraced in other findings or conclusions found elsewhere in this document.

1. Defendants plan to discontinue grades K-6 at Jonesview (an historically white school) and at Talladega County Training School (an historically black school) and to relocate those grades at the site of the former Idalia School (which burned in 1986) in a new school building which will house grades K-6 from the three school zones.

2. Black parents have contributed significant time and financial resources to support and enhance the

Talladega County Training School. Despite these contributions and the expenditures by the Board of Education for maintenance and improvements over the years, the Training School, like other schools in the system, has generally deteriorated. A renovation and rebuilding program has been underway for several years and Talladega County Training School is slated for substantial renovation in the immediate future. Several historically white schools are not as far along as Talladega County Training School in the renovation plans.

3. Assignment of all students from the new school to the Talladega County Training School for grades 7-12 would add about 135 white students to the Training School which would significantly improve integration at the Training School. About 55 of those students would come from Jonesview Elementary School zone and approximately 80 would be supplied by Idalia Elementary School zone. While it seems clear the Jonesview students will be so assigned, the Board has not made a decision as to where the Idalia students will be assigned.

4. Although the Board has never formally voted to close the elementary section of the Talladega County Training School or voted to close Jonesview Elementary school, when the Board approved the construction of the new 500 pupil school to be known as Stemley Bridge Road Elementary, implicit in that decision was the closure of Jonesview and the elimination of elementary grades at the Talladega County Training School.

5. The Talladega County Board of Education has not finalized where students attending the new school who currently live in the Idalia School zone will go for grades

7-12, but the Superintendent presently intends to recommend that many of them attend Drew Middle School for grades 7-8 and Lincoln High School for grades 9-12 which are the schools those students have historically been zoned to attend.

6. Defendants plan to renovate the Talladega County Training School for use as a 7-12 facility. As of June 1988, the estimated expenditure on renovation for the Training School was $500,000.

7. The construction of a new school at the site adjacent to the Idalia School, originally estimated to cost about $1,200,000, later estimated to cost $1,800,000, is now anticipated by defendants to cost almost $2,600,000.

8. The plan to renovate all buildings at the Training School for use in the operation of a grades 7-12 school would cost essentially the same whether the new elementary school is located there or elsewhere. The cost of construction of a new school building containing about 53,000 gross square feet for use as a K-6 grade school for about 550 students would be approximately the same whether constructed at the Idalia or at the Talladega County Training School site.

9. In 1988 the Board relocated the Phyllis Wheatley Middle School, which historically was a black school, to a new facility about a mile from its former site. Although its name was changed to Childersburg Middle School, its attendance zones, faculty and bus routes did not change. The composition of the student body remained the same.

10. Some black parents, including Mr. Charles Woods (a local leader), objected to moving the Wheatley

School to the new location and changing the name. Mr. Woods believed the plan was racially motivated and part of a pattern of closing historically black schools. He asked to be allowed to meet with the Talladega County Board of Education to express his opposition to the moving of Phyllis Wheatley but was not successful in arranging such a meeting.

11. Under the terms of a resolution adopted November 22, 1983 by the Talladega County Board of Education and filed in this court in *Lee v. Macon County* prior to the March 13, 1985 "unitary" order, the Board committed itself to maintaining a unitary, nondiscriminatory school system. There is no evidence that it has violated this commitment since March 13, 1985; and the court is satisfied that the Board's actions and decisions challenged in this suit do not violate that commitment.

12. Prior to the March 13, 1985 order (a) determining that the Talladega County School System had attained unitary status and (b) dismissing the Talladega County Board of Education from the *Lee v. Macon County* litigation, the Board decided to close Hannah Mallory Elementary School, a 100% black school with grades K-6, at the end of the school year 1984-85. A formal "closure" resolution was adopted in the summer of 1985.

13. When the Hannah Mallory School was closed after the 1984-85 school year, the Hannah Mallory attendance zone was divided among three attendance zones primarily on a proximity basis. Prior to the March 13, 1985 unitary order, defendants had submitted to the Department of Justice the proposed closing of Hannah Mallory and the anticipated distribution of its students as

actually distributed. The plan envisioned assigning the 132 black students at Hannah Mallory as follows: 26 – Childersburg; 26 – Jonesview; 80 – Talladega County Training School. Childersburg zone, Jonesview zone and Talladega County Training zone all received the Hannah Mallory students, all of whom were black.

14. As a result of the zoning changes made in 1985 when Hannah Mallory was closed, about 132 black students were reassigned to the three zones earlier mentioned. The following school year, as a result of a combination of those assignments and natural or normal enrollment fluctuations, black student enrollments in grades K-6 in the three receiving school districts increased as follows: Jonesview went from 85 to 116; Childersburg went from 134 to 147; and Talladega County Training went from 134 to 236.

15. This increase crowded the facilities at the Training School and required the use of some portable classrooms. Disbursement of the Hannah Mallory students among the three receiving zones promoted integration in the Childersburg zone, adversely affected integration in the Jonesview zone and had no significant effect on integration at Talladega County Training School. The increased concentration of black students at the Training School makes it more difficult to desegregate the Training School, but the planned new school will dramatically improve the black-white ratio for the students who currently attend grades K-6 at the Training School. Those students currently are in an environment which is 99% black and will be in an environment that is 70-75% black.

16. This proposed fact has not been established.

17. This proposed fact has not been established.

18. The additional K-6 zone that was created for the Training School following the closure of Hannah Mallory is not contiguous with the original Training School K-6 zone and in this respect it is unique; but the K-6 zone is contiguous to a then existing Training School 7-12 zone.

19. There is property adjacent to the Talladega County Training School which if acquired by gift, purchase or condemnation, would have been suitable for expansion. This includes property owned by members of the Dumas family and the Lawson family. A minimum of 15 acres were needed for the new school and the Board ultimately was able to acquire for the new school 48 acres at the Idalia site in October of 1987.

20. Inquiries in the spring of 1988 made to a representative of the Dumas property owners by the principal of the Talladega County Training School, Mr. John Stamps, caused Mr. Stamps to conclude and to report that the Dumas owners after resolving a boundary line problem with the Board, might be receptive to offers to purchase or swap land and might even donate some property to the school. The Dumas representative seemed particularly concerned that a portion of their land might be across the road and was being used by the school as school land. All of this took place *after* the Board of Education had acquired a 48 acre site at Idalia and made the decision to build the new school at the Idalia site and also after including funds for construction of the new school in the bond issue authorized December 1, 1987.

21. In 1988, Mr. Stamps inquired of a representative of the Lawson family whether it would consider the sale of about 6 acres of property adjacent to the school. This was adjacent to the football field and was not a suitable site for a new school facility. The representative reported that if absolutely necessary, the family might consider a sale. This conversation also took place after the Board had acquired the 48-acre site at Idalia.

22. There is no evidence that the Board sought opinions from parents, black or white, of students to be affected by the decision to create a single large elementary school to serve the Jonesview, Talladega County Training and Idalia zones. Board meetings, however, have been open to all parents and interested persons. The Board sets aside a portion of each meeting to receive comments, complaints, etc., from members of the public in attendance.

23. On January 21, 1988, Mr. Augustus Elston wrote Superintendent Grissett noting that concerned parents with children in attendance at Talladega County Training High School were requesting permission to be heard at the next meeting of the Talladega County Board of Education. The letter stated that "[t]here are many items of grave concern that we need to discuss." This letter was also sent to the other Board members. The next day the Superintendent of the Board wrote to Elston, referring him to Principal Stamps and saying he (the Superintendent) would be glad to meet with Mr. Elson, if necessary. This letter was followed up by a telephone call from Principal Stamps to Mr. Elston.

24. On January 27, 1988, Mr. Elston again wrote to Dr. Grissett requesting that concerned parents of Talladega County Training High School be allowed the opportunity to be heard at the next Board meeting. The letter requested that if the parents were not following the proper channels to get on the agenda, that they be informed of the correct procedure. Copies were sent to the other Board members. No response to this letter was made by any Board member or Dr. Grissett.

25. On February 9, 1989, Mr. Elston wrote to Dr. Morris, Chairman of the Talladega County Board of Education, complaining about an atmosphere of racism and racially prejudiced occurrences, and expressed concern that the Training School had been marked for closure and been excluded from recent planning for facility improvements. Four days later the Chairman of the Board of Education responded, specifically referring to the Talladega City Training School concerns and welcoming them to a Board meeting to voice any concern. Mr. Elston attended the next Board meeting but when the time set aside to receive public comments arrived, Mr. Elston did not speak up. Mr. Elston explains this silence by his belief that it was too late in the meeting for the Board properly to consider his concerns.

26. This proposed fact has not been established.

27. On June 23, 1988, the Board, through its counsel, informed counsel for some of the plaintiffs in writing that the new school would accommodate students currently enrolled in the Idalia School and the "surrounding area" and that the attendance zone for the new school "could"

include students from Lincoln Elementary and the Training School. The Board, through its counsel, reported that it had no plans to change the use of the Jonesview Elementary School. No evidence was presented to the court which sheds light on this incorrect information in such correspondence.

28. With respect to the May 1988 request for state facilities surveys referenced in paragraph 35 of the Stipulated Facts, the Board, through its counsel, informed counsel for plaintiffs that when the Board received the facilities reports, a copy would be made available.

29. This proposed fact has not been established.

30. Significant numbers of white students who reside within the Talladega County Training School zone attend public schools in the Talladega City School system. This has occurred for many years and occurred long before the March 13, 1985 "unitary" order.

31. Dr. Grissett has not contacted school officials of the Talladega City School system in an effort to stop it from accepting into its system children who reside in the Talladega County Training School zone.

32. This proposed fact has not been established.

33. On April 19, 1979, the Justice Department notified counsel who represented both the Talladega City Board of Education and the Talladega County Board of Education that the Talladega City School system was governed by a provision in its school desegregation order that it should not consent to transfers where the cumulative effect would reduce desegregation in either district.

34. As required by state law, defendants have transferred school records of students leaving the Talladega County School system after they have enrolled in the Talladega City School system.

35. The Talladega County School system does not have a written policy regarding verification of residences of students seeking to enroll in County schools. It does seek to verify the residences of students in its system transferring to another school in its system.

36. Defendants are aware of zone-jumping by white and black students alike. Many of the white students are likely avoiding historically black Talladega County Training School. One of the objectives in building the new Stemley Bridge Road Elementary School was to discourage such zone-jumping; another of such objectives was to foster and promote integration of children in the three affected zones.

37. This proposed fact has not been established.

38. If there is any significant zone-jumping *within* the County system by students avoiding the Training School, no evidence sufficient to reach that conclusion has been presented.

39. The Board of Education provides transportation to students who attend school in the County system and it is possible for some students to use that transportation to attend an incorrect school.

40. The Talladega County Board of Education may have received an inquiry in 1984 by the Justice Department regarding possible zone-jumping by students avoiding historically black Hannah Mallory School and the

Talladega County Training School. The extent of any such zone-jumping in 1984 is not known.

41. About ten years ago, when a portion of the Talladega County school district was sought to be annexed by a school system in another county, the Board took steps in *Lee v. Macon County* to stop the annexation. The area sought to be annexed contained mostly white students and both the school systems involved were under court ordered integration. The Board has taken few, if any, steps to stop the loss of white students to the separate school systems operated by the City of Talladega or the City of Sylacauga from predominately and historically black Talladega County Training School.

42. The Talladega County Board's policy authorized majority-to-minority transfers.

43. The Talladega County Board has not advertized [sic] the availability of the majority-to-minority transfer option.

44. One of the members of the Talladega County Board was recently asked and did not know what a majority-to-minority transfer is.

Facts to be offered by proffer

The document filed August 11, 1989 contain 10 paragraphs setting forth "facts" which counsel contemplated would be offered to the court by a proffer. No proffer was made during the trial and that section of the August 11, 1989 document will not be addressed by the court.

Defendants' proposed factual findings

In 24 separately numbered paragraphs counsel for defendants presented to the court proposed factual findings. The court will now set forth, using the same paragraph numbers, some of its findings of fact and conclusions of law germane to each proposed factual finding. The failure to include the language or the "facts" as proposed by counsel for defendants could generally be viewed as a determination by the court that the proposed language or "facts" have not been established or are embraced in other findings or conclusions found elsewhere in this document.

1. Plaintiffs have failed to establish their entitlement to prevail or obtain relief under any of the claims they have made in their complaint.

2. There has been no significant or material change in the percentage of white and non-white students attending schools operated by the Talladega County Board of Education during the past 15 years.

3. The Talladega County schools were under the supervision of the United States District Court from 1970 until March 13, 1985.

4. The Talladega County Board of Education was dismissed from the *Lee v. Macon County* litigation on March 13, 1985 by consent, the court expressly concluding that the system had achieved a unitary status.

5. The closing of Jonesview School, the elimination of grades K-6 at Talladega County Training School, and the consolidation of all those students with students in

the Idalia zone at a new facility under construction adjacent to and on the north side of the old Idalia site is consistent with the operation of a unitary, racially nondiscriminatory public school system. The anticipated zones for the students when they reach grades 7-12 are also consistent with such an operation.

6. The decision to build the new Stemley Bridge Road Elementary School now under construction has not been shown to have been racially motivated. Its construction will provide better educational opportunities for all of the children it serves. Construction of the new Stemley Bridge School will enhance desegregation of grades K-6 at the present Talladega County Training School, since it will take students who are now in an environment about 99% black and change that ratio to about 70-75% black.

7. The Board was reasonable in assuming that the Lawson family which owns much of the land around the present site of the Talladega County Training School likely would not sell land to the Board. At one point in the past, the patriarch of the family is reputed to have told a former Board member that he would "freeze in hell" before he would sell another piece of land to the County. Regardless of whether land might have been available at the Talladega County Training School site, the Board made a sound decision from an educational viewpoint not to locate the new elementary school at the site of a middle school/high school. This decision did not have a racially discriminatory animus and did not have a disparate impact on blacks.

8. The plaintiffs have not shown that the location of the new Stemley Bridge Road School was racially motivated or effected a disparate impact on blacks.

9. Talladega County Training School is not scheduled for closing, but is scheduled for substantial renovation and upgrading so that it may serve as an expanded grades 7-12 school. The capital outlay for the improvements will equal or exceed $500,000.

10. The Talladega Board of Education neither "allows" nor "condones" out-of-zone attendance, or "zone-jumping" by a child residing within its system but attending a public school outside its system. The Board has a significant financial interest in discouraging such zone-jumping. The Board also has a general policy against a child zoned for one of its schools attending one of the Board's schools out of his/her zone, but it has two reasonable exceptions to this policy, viz., children of employees of the Board may attend in the zone of a parent's employment and children in need of special education may attend out-of-zone. No evidence even suggests that these exceptions are abused or applied along racial lines, and it is clear the Board takes steps calculated to assure that a child in its system attends the proper school. Talladega County School personnel have been aware for quite some time that students of both races, but primarily white students, who are zoned for Talladega County schools such as Talladega County Training School are attending schools in the Talladega City system and the Sylacauga City system. Talladega County school personnel are, as a practical matter, unable to prevent this, since the enrollment and attendance of a public school student is verified and determined by the gaining school system (i.e., the city school system) and not by the losing school system (in this case, Talladega County). Talladega County loses approximately $2,000 to $3,000 (depending

upon the year) of state education money per child per year for every "county" student who attends a "city" system school.

11. Talladega County school personnel have previously attempted to bring the problem discussed in paragraph 10 above to the attention of the Federal Bureau of Investigation and the United States Justice Department, but nothing has happened.

12. Only one historically black school (Hannah Mallory) has been closed since 1970. One historically white school (Eastoboga) has also been closed during that period and another historically white school (Jonesview) is currently in the process of being closed.

13. At the end of the 1987-88 school year, the Phyllis Wheatley School, with the support of some members of the local black community and over the objections of other members of the local black community, was relocated to a new site about one mile away. The relocation of Phyllis Wheatley School did not change the bus route, faculty, or student composition in any way. The name of the school was changed to Childersburg Middle School.

14. In 1985 Hannah Mallory was the only remaining one-race school in Talladega County. It had been allowed to remain that way during the entire time the school system was operating under its *Lee v. Macon County* integration order primarily because of the school's geographical location and the difficulty of integrating it.

15. The trend in modern public education is to consolidate smaller "neighborhood" schools into larger ones with more diverse student bodies and better facilities.

The new Stemley Bridge Road School is in line with this trend, and it will make modern, up-to-date facilities available to a large number of children in grades K-6. Its student body will be 70-75% black.

16. There were two principal logistical problems with locating the new larger elementary school at the site of Talladega County Training School: (1) adequate land consisting of a minimum of 15 acres was not readily available, and (2) the Board needed the existing space at Talladega County Training School embracing about 55,000 square feet for its planned upgrade of that school and the enhanced grades 7-12 program it now has planned. The Board also had a strong desire not to locate the large, consolidated elementary school at the site of a middle school or a high school.

17. The new Talladega County Training School building program will include an up-to-date library, a media center embracing a computer lab, and the addition of adequate science laboratory space. It will also include greatly expanded home economics and industrial arts programs and facilities. The remodeling program also includes substantial physical improvements, such as re-wiring, re-lighting, replacement of all windows and doors, etc.

18. By expanding and upgrading the facilities at Talladega County Training School to enhance the education offered to grades 7-12 there, the Board hopes to be able to improve its course offerings and attract and retain more white students to improve racial balance at Talladega County Training School. Regardless of how effective this upgrade is in attracting more students to that

school who are now going to private schools or to adjoining public systems, the planned renovation at Talladega County Training School will unquestionably improve the quality of education for students now attending there.

19. The Talladega County Board of Education has moved forward to improve the quality of education offered to all of its students since March 13, 1985. In so doing there is no evidence which can support a conclusion that race impermissibly was considered in the decision-making process. There was no discriminatory animus behind the plans and decisions challenged in this case and it is clear that the challenged plans and decisions have had no disparate impact on blacks.

20. It is clear to the court that over the years the Board has delayed providing to the public, black and white alike, information with regard to developments under consideration by the Board, but there is no evidence that this has been done in a racially discriminatory manner or with a racial animus. The Board has not refused to receive comments or input from plaintiffs at Board meetings or otherwise.

21. Mr. Elston wrote a total of three or four letters to Talladega County school personnel, but all of those letters were vague and he never made any follow up about what his "concerns" were. In all but one instance the Board properly responded to such letters. The court is particularly impressed with the restrained response (Plaintiffs' Exhibit 4) to one of such letters (Plaintiffs' Exhibit 5). Neither Mr. Elston nor any other plaintiff who attended a Board meeting asked to speak to the Board meeting about

any of the "concerns" which they have raised in the complaint.

22. The extent of the "zone-jumping" in which Talladega County students are attending Talladega City or Sylacauga City schools is not known, but it involves a significant number of students, most of which are white but some of which are black. Any such jumping does not appear to have changed significantly over the years the racial composition of the students in the Talladega County system or the Talladega City system. Talladega County system enrollment has remained about constant at 43% black and Talladega City system enrollment has moved in recent years from 40% black to 43% black notwithstanding the City's receipt of students who reside outside the City. Many of the students who are or have been attending Sylacauga City Schools have done so under "temporary guardianship" or similar court orders which could well have been devices to permit their attendance at Sylacauga City Schools. There is no evidence that the orders are fake and it seems that each such order was signed by a state court judge with appropriate jurisdiction. With regard to each of these "receiving" systems, the Talladega County Board has few, if any, avenues available to it to stop this drain from its system other than to discourage it by improvements to its system, such as the improvements out of which this suit arose. Certainly it is clear that the Board would like to stop the zone-jumping. The Board is in no way intending to discriminate against plaintiffs on the basis of race or to deny plaintiffs equal protection by not being more "creative" in finding a way to prevent such zone-jumping.

23. The Talladega County School System has not "notified parents of children going out of zone" to another public school system that their actions are improper. Defendants' view that it has no legal right or duty to do so is a sincere view with a reasonable basis to support it. Transferring school records, in accordance with state law requirements, of students leaving the County system for the City system does not make the defendants accountable for the conduct of the parents and the receiving school officials. Any "zone-jumping" *among* or *between* zones in the County school system is very limited, not authorized by the defendants, includes black as well as white students, and is largely corrected through the Board's policy of requiring the receiving principal to investigate transfers within the County's system.

24. One of the purposes, and hopefully one of the results of the upgrading and enhancement of Talladega County Training School grades 7-12 is to stop the loss of white students by providing attractive physical facilities and curriculum changes at Talladega County Training School.

Summary

In this case plaintiffs have endeavored to establish that several decisions and practices of defendants violate or violated (a) the Equal Protection Clause of the Fourteenth Amendment, (b) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, and (c) regulations promulgated to effectuate Title VI, 34 C.F.R. §100 *et seq.*, and particularly 34 C.F.R. § 100.3. They have failed in this

endeavor. With regard to all such claims, plaintiffs have failed to establish by a preponderance of the evidence that any of the challenged decisions and practices were tainted by a racially discriminatory animus. A discriminatory intent being a prerequisite to recovery under the constitutional claim and the statutory claim, defendants are entitled to a judgment in their favor on these claims. Also, to the extent that plaintiffs sought to prevail on disparate *treatment* theories under their claims predicated on regulations to effectuate Title VI, defendants are entitled to a judgment in their favor. With regard to the claims based on disparate *impact* theories under the regulations to effectuate Title VI, plaintiffs have failed to establish by a preponderance of the evidence that any of the challenged decisions and practices violated the regulations or otherwise had a disparate impact on blacks. Thus plaintiffs have not established even a prima facie case under the regulations. Even though defendants had no burden of proof, they have articulated and established by clear and convincing evidence substantial, legitimate, non-discriminatory reasons for the decisions and practices in question. Since the court has earlier held that the decisions and practices of defendants did not result in a disparate impact on plaintiffs, it goes without saying that plaintiffs also failed to establish an alternative to the challenged decisions and practices which alternative would have resulted in less of a disparate impact.

A separate final judgment in favor of defendants will be entered.

DONE this 19th day of September, 1989.

/s/ James H. Hancock
UNITED STATES DISTRICT
JUDGE

No. 92-825

In the Supreme Court of the United States

OCTOBER TERM, 1992

ANTHONY T. LEE, ET AL., PETITIONERS

v.

TALLADEGA COUNTY BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that prior desegregation orders were no longer enforceable against the respondent school district after the district court, pursuant to the parties' joint stipulation of dismissal, declared that the school system had achieved unitary status and dismissed the case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 963 F.2d 1426. The memorandum opinion and order of the district court (Pet. App. 15a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1992. A petition for rehearing was denied on August 13, 1992. Pet. App. 32a-33a. The petition for a writ of certiorari was filed on November 12, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This school desegregation case derives from an action filed in federal district court in 1963 seeking to desegregate the public schools in Macon County, Alabama. The complaint in that action was subsequently amended to challenge dual school systems throughout the State and to seek statewide desegregation. Following extensive litigation, the district court concluded that a dual school system based on race was maintained and operated throughout the State. In 1967, the court ordered statewide desegregation and required specific school systems, including the Talladega County school system, to adopt desegregation plans that met the standards set forth in the court order. *Lee* v. *Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.), aff'd, 389 U.S. 215 (1967). See Pet. App. 2a-3a.

In response to the 1967 desegregation order, the Talladega County Board of Education proposed a desegregation plan. After that plan proved ineffective, the board submitted a new plan that was approved as modified on February 3, 1970. Subsequent court orders in 1970 and 1971 modified the February 3, 1970, order. Pet. App. 3a.

2. On November 7, 1983, the Talladega County school board filed a "Motion for Court to Relinquish Jurisdiction," asserting that the school system had become unitary and asking the court to relinquish jurisdiction and control over it. The school board subsequently amended its motion by filing a resolution which it had adopted on November 22, 1983. See Pet. App. 26a-28a. The resolution stated that the school board had complied in good faith with all court orders and laws of the United States; the school

system was now unitary and has been for many years; no vestiges of racial segregation remained; and the school board had adopted the resolution "in support of its motion asking the Court to enter an order relinquishing jurisdiction and control over the operation of the Talladega County System." *Id.* at 26a. The resolution also stated that the school system "shall be operated at all times so as to conform with the United States Constitution, laws passed by Congress, and all previous orders of this Court." *Id.* at 27a.

On March 13, 1985, the district court approved a joint stipulation of dismissal, agreed to by all the parties. Pet. App. 23a-28a. The stipulation incorporated the school board resolution, and stated that "[i]t is agreed by all parties that [the orders entered in the case] have been implemented in a manner that is adequate for establishment of a unitary school system in Talladega County" and that "dismissal of this cause of action" is appropriate at this time. *Id.* at 24a. On the same date, the district court entered a judgment and order stating that the Talladega County school system had achieved unitary status, entering final judgment, and dismissing the case. *Id.* at 29a-31a.

3. On July 21, 1988—more than three years after the district court had dismissed the case—petitioners filed a motion to reopen the case, seeking an order directing the school board to comply with previous court orders. The motion to reopen alleged, in part, that the school board had engaged in a racially discriminatory pattern of closing schools in the black community, had implemented a transfer policy that allowed students to attend school out of their assigned

attendance zone, and had not implemented promised affirmative action plans for faculty and staff. Pet. App. 3a-4a.

Petitioners argued that the district court had jurisdiction to reopen the case and enforce the earlier injunctive decrees because the injunctions entered in the case had never been expressly vacated. They also argued that the school board had agreed (in the resolution) to abide by outstanding court orders, and that they were merely returning to court to enforce that agreement. Finally, petitioners argued that the case should be reopened pursuant to Fed. R. Civ. P. 60(b)(5) because "there 'ha[d] been a fundamental change in the legal predicates upon which [the] dismissal [wa]s based.'" Pet. App. 4a-5a. Petitioners asserted that the use of the term "unitary" or "unitariness" was not interpreted at the time of the stipulation and dismissal order to mean that the case was formally concluded. *Id.* at 5a.

The district court denied petitioners' motion to reopen the case. Pet. App. 15a-19a. The court found that it did not have jurisdiction to reopen the case because the case was formally dismissed and "in all respects concluded as to Talladega County Board of Education." *Id.* at 18a. The court stated that there were no "existing court orders" to enforce because in view of the dismissal "there was no retention of jurisdiction by this court and there remained no residual injunction requiring [the school board] to do or not to do anything." *Ibid.* The court also noted that the parties' predominant motive for obtaining the original dismissal order was their recognition that the litigation must eventually come to an end, and that "[t]he whole point of the dismissal * * * was

to require that any party who found the dismissal erroneous do something about it *then*." *Ibid.* The court concluded that petitioners could obtain the relief they sought only by filing a new lawsuit. *Id.* at 18a-19a.

4. The court of appeals affirmed. Pet. App. 1a-14a. The court rejected petitioners' contention that the previous district court orders remained enforceable against the school board even after dismissal of the case merely because they were never expressly vacated. Pet. App. 5a-8a. The court reasoned that the prior injunctive orders were implicitly dissolved when the district court declared that the school system had achieved unitary status. *Id.* at 8a. The court explained that "[t]his is so because the limited nature of a federal court's remedial powers as well as the fundamental limitations of federalism render continuing federal judicial supervision of local school authories incompatible with a finding of unitary status." *Id.* at 5a-6a (citing *Board of Educ. of Oklahoma City Pub. Schools* v. *Dowell*, 111 S. Ct. 630 (1991)). The court further noted that "[i]njunctive decrees in school desegregation cases were never intended to operate in perpetuity," and that when the "vestiges of * * * prior illegal racial discrimination have been eliminated to the extent practicable"—that is, when the school system has achieved "unitary status"—"the court should and must return control over the[] school system to the local school authorities." Pet. App. 6a-7a.[1]

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[1] The court of appeals also rejected petitioners' argument that the school board resolution created an obligation, enforceable against the school board, to continue to be bound by the previous court orders. Pet. App. 8a-13a. The court

ARGUMENT

Petitioners contend that this Court should grant certiorari to consider whether the court of appeals properly concluded that the district court's judgment and order dismissing the case dissolved the prior injunctive orders. The court of appeals' fact-bound decision, however, is a straightforward application of this Court's most recent school desegregation decisions, and does not conflict with any decisions of other courts of appeals. Accordingly, further review is not warranted.

1. Petitioners principally contend (Pet. 8-14) that the court of appeals erred in concluding that the district court "implicitly dissolved" its previous court orders when it found that the school system had achieved unitary status and dismissed the case. According to petitioners, that ruling was inconsistent with this Court's decisions in *Board of Educ. of Oklahoma City Pub. Schools* v. *Dowell*, 111 S. Ct. 630 (1991), and *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), because it ignored this Court's rulings that the terms "unitary" and "unitary status" are not dispositive of whether desegregation decrees should be terminated, and that the parties are entitled to a "rather precise statement" from the court if such a decree is to be terminated or dissolved. Pet. 10-12 (citing *Dowell*, 111 S. Ct. at 636). This argument is unpersuasive, and misconstrues the decision below.

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stated that "[t]he sense of finality in the resolution is inconsistent with the notion that a party would enjoy the right to petition the court years later to enforce earlier court orders." *Id.* at 13a. In addition, the court rejected petitioners' argument that the district court abused its discretion in refusing to grant relief under Fed. R. Civ. P. 60(b)(5). Pet. App. 13a-14a.

In *Dowell*, the district court in 1977 issued an "Order Terminating Case," which stated that "substantial compliance with the constitutional requirements has been achieved," and that the school district was unitary. 111 S. Ct. at 633-634. The order also stated that "[j]urisdiction in this case is terminated," but did not expressly dissolve previous court orders. *Id.* at 634. That 1977 order was not appealed. *Ibid.*

In 1985, the plaintiffs filed a motion to reopen the case, contending that the school system had not achieved unitary status. The district court denied the motion, holding that in 1977 it had relinquished jurisdiction because the school system was unitary and that as of 1985 the school system remained unitary. 111 S. Ct. at 634.

The Tenth Circuit reversed and remanded, finding that the original desegregation injunction was still in effect. On remand, the district court concluded that the injunction should be dissolved and the school system returned to local control. 111 S. Ct. at 634-635. The Tenth Circuit again reversed, holding that dissolution of the desegregation order was inappropriate because the defendants had not shown a "grievous wrong evoked by new and unforeseen conditions." *Id.* at 635 (quoting *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932)).

This Court reversed, but before doing so it approved the Tenth Circuit's previous ruling that the 1977 order declaring the school system to be "unitary" had not dissolved the desegregation decree. The Court concluded that since "[t]he District Court's 1977 order is unclear with respect to what it meant by unitary and the necessary result of that finding," the Court would decline to find that the 1977 order finally terminated the litigation. 111 S. Ct. at 636.

The Court explained that "it is a mistake to treat words such as 'dual' and 'unitary' as if they were actually found in the Constitution." *Ibid.* The Court added that "[i]n *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424 (1976), we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, [plaintiffs] as well as the school board are entitled to a like statement from the court." 111 S. Ct. at 636.

Petitioners assert (Pet. 9) that the facts in *Dowell* are "strikingly similar" to those in the instant case, and thus that the court of appeals improperly construed the district court's finding of "unitary status" to have dissolved the prior injunctive orders in the absence of an express statement to that effect. That contention is incorrect. First, whereas in *Dowell* the 1977 order relinquishing jurisdiction was unclear, in the instant case the district court's dismissal order was unambiguous. The order at issue in *Dowell* provided that the school board had "operated the Plan properly," had "slowly and painfully accomplished" a "unitary system," and was therefore "entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court." 111 S. Ct. at 633-634. The order also stated, however, that the court did "not foresee that the termination of * * * jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system." *Ibid.* The latter statement suggests that the court did not intend the 1977 order to release the school system from the desegregation order, especially since the 1977 order came only five years after the desegregation plan had been implemented. It was in this con-

text that this Court stated that if a school desegregation decree is to be dissolved, the parties are entitled to a "rather precise statement." *Id.* at 636.

By contrast, in the instant case the joint stipulation of dismissal, entered 15 years after the desegregation plan had been ordered, stated that "[i]t is agreed by all parties that these orders [the court orders entered in the case] have been implemented in a manner that is adequate for establishment of a unitary school system" and that "dismissal of this cause of action * * * is appropriate." Pet. App. 23a-25a. The stipulation also notes that it follows the school board's "Motion for Court to Relinquish Jurisdiction." *Id.* at 23a-24a. Further, the district court's 1985 order states that the school system has achieved unitary status and that the case is dismissed. *Id.* at 30a. These statements are a "precise statement" that the stipulation and order "finally terminate[d]" the litigation (see 111 S. Ct. at 636): the court orders had been "implemented," the school system had achieved "unitary status," and the "cause of action" was "dismissed." As the court of appeals found, the district court in this case used the term "unitary status" to mean that the school board had " 'complied in good faith' with all court orders and that 'there is not . . . any vestige of racial discrimination remaining in the Talladega County System.' " Pet. App. 8a n.3.[2] Thus, this case presents none of the

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[2] Petitioners contend (Pet. 13 n.14) that the court of appeals misinterpreted the district court's use of the term "unitary status." Both courts below rejected petitioners' interpretation of the district court's dismissal order, however, and further review of this fact-bound question is not warranted.

ambiguity that led the Court in *Dowell* to conclude that the 1977 order "did not finally terminate the Oklahoma City school litigation." 111 S. Ct. at 636.

2. Moreover, petitioners' argument interprets *Dowell* to mean that as a matter of law a school board remains bound by previous court orders despite a proper finding that the school desegregation decree has been fully implemented and the school system is unitary, merely because the court did not expressly dissolve the orders. Such a conclusion would run sharply counter to the strong preference expressed in *Dowell* and *Freeman* v. *Pitts*, *supra*, for termination of federal court oversight once prior constitutional violations have been remedied. In *Dowell*, for example, the Court held that dissolution of a desegregation order is required once a school board has shown that it "[i]s being operated in compliance with the * * * Fourteenth Amendment, and that it [i]s unlikely that the school board would return to its former ways." 111 S. Ct. at 636-637. The Court explained that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination," and thus that desegregation decrees, unlike the decree in *Swift*, "are not intended to operate in perpetuity." *Id.* at 637. The Court further stated:

> The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the legal authorities have operated in compliance with it for a reasonable period of time properly recognizes that necessary concern for the important values of local control of public school systems dictates that a

> federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.

Ibid. (internal quotation marks omitted).

Similarly, in *Freeman* v. *Pitts*, the Court held that "federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations." 112 S. Ct. at 1445. The Court reiterated that federal judicial supervision of local school systems was intended as a temporary measure, and that "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Ibid.*

It follows that the court of appeals' decision is consistent with *Dowell* and *Freeman*.[3] Although the court stated that the finding of unitary status "implicitly" (or "[b]y operation of law") dissolved the prior court orders, it did not reach that conclusion,

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[3] The court of appeals' decision is also consistent with decisions in other circuits. See, *e.g.*, *United States* v. *Overton*, 834 F.2d 1171, 1177 (5th Cir. 1987) ("the idea that a school district can be declared unitary and yet be answerable to the federal courts for failure to abide by desegregation plans, regardless of segregative purpose, is at war with itself"); *Morgan* v. *Nucci*, 831 F.2d 313, 318 (1st Cir. 1987) ("the one thing about unitariness is its consequences: the mandatory devolution of power to local authorities"); *Riddick* v. *School Bd.*, 784 F.2d 521, 535, 539 (4th Cir.), cert. denied, 479 U.S. 938 (1986) ("once the goal of a unitary school system is achieved, the district court's role ends"; following a finding that the school system is unitary "control of the system must be allowed to return to local officials").

as petitioners contend, solely by relying on the district court's use of the term "unitary status." Rather, the court of appeals found that the prior court orders had been dissolved because it correctly recognized, in keeping with *Dowell* and *Freeman*, that the purpose of a school desegregation case is the disestablishment of a dual school system, and that "[w]hen local school authorities demonstrate that they have complied in good faith with the district court's desegregation decree and that the vestiges of their prior illegal racial discrimination have been eliminated to the extent practicable * * * the court should and must return control over their school system to the local school authorities." Pet. App. 7a.[4] The court of appeals' fact-bound conclusion that the standards of *Dowell* and *Freeman* had been met in this case does not warrant further review.[5]

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[4] To be sure, it would be preferable for district courts after *Dowell* explicitly to vacate previous court orders if they are dismissing the case and terminating their jurisdiction. But a court's failure to do so cannot, consistent with *Dowell* and *Freeman*, extend the life of those orders if, as in the instant case, the constitutional violations have been cured and the court otherwise makes clear that the litigation has been terminated.

[5] Petitioners also assert (Pet. 14-15) that this Court should grant certiorari because the court of appeals' ruling will affect numerous desegregation cases that remain pending in district courts within the Eleventh Circuit. Because the court of appeals' decision is correct and involves only the application of settled legal principles to the facts of this case, petitioners' argument is insubstantial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ANTHONY T. LEE, *et al.*,

Petitioners,

V.

TALLADEGA COUNTY BOARD OF EDUCATION, *et al.*,

AND

UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION TO CERTIORARI

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Respondents' opposition briefs fail to address adequately the fact that the Court of Appeals for the Eleventh Circuit ruled as a matter of law that existing injunctive decrees in this school desegregation case were *implicitly vacated* when the district court used the term "unitary status" in an order dismissing the case. The court below stated:

> *By operation of law*, the orders enjoining the [School Board] were dissolved *when the district*

> *court declared that the school system had attained unitary status.*

(App. 5a)(emphasis added).

> [T]he district court found in March 1985 that the Talladega County School System had achieved unitary status. This finding *implicitly dissolved* the injunctions in effect at that time.

(App. 8a)(emphasis added, footnote omitted). The ruling below is clear and undeniably conflicts with *Board of Education of Oklahoma City Public Schools v. Dowell*, __ U.S. __, 111 S. Ct. 630, 636 (1991), announcing that a precise statement is required when school desegregation decrees are being terminated.

Respondents attempt to distinguish this case from *Dowell* by arguing that *Dowell* was ambiguous with respect to final termination of the case, where in this case it is clear that the district court intended the case to be concluded finally. Talladega County Board of Education, Brief in Opposition at 5; United States, Brief in Opposition at 9. But simply saying that the cases are distinct does not make them so. In *Dowell*, the court anticipated that the decree would remain in effect despite dismissal of the case. *See* App. at 37a-39a. Here the district court incorporated into its dismissal order a School Board Resolution making clear the continuing obligations on the part of the Board, including continued compliance with

prior court orders.[1] *See* App. at 26a-28a. Thus, this case is just like *Dowell*.

Moreover, as implicitly conceded by the United States in footnote 4 of its Brief in Opposition, the ruling below re-opens the door for district court dismissals of desegregation cases without express dissolution of the injunctive decrees. The confusion spawned by this approach is as evident in this case as it was in *Dowell*. The courts in the Eleventh Circuit have already adopted inconsistent approaches to dismissal of desegregation cases. *See Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 & n. 12, 1414 (11th Cir. 1985) and cases cited therein; *United States v. Board of Education of Jackson County*, 794 F.2d 1514, 1543 (11th Cir. 1986) ("That school districts have become unitary, however, does not inevitably require the court to vacate the orders upon which the parties have relied in reaching that state.") Reversal is necessary to eliminate the continued confusion, and the conflict with *Dowell*. Furthermore, summary reversal is warranted on this record.

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[1]Contrary to the suggestion of the Talladega County Board of Education, Brief in Opposition at 2, the district court in the separate litigation, *Elston v. Talladega County Board of Education*, App. 34a-36a, found no violation of the court orders despite the large number of interdistrict transfers because the court concluded that Talladega County was not intentionally discriminating and had no legal duty to stop the transfers. Talladega County Board of Education, Brief in Opposition, A-19-20. This, of course, totally ignores the outstanding court orders, which was justified by application of the holding that Petitioners seek to have this Court review in this proceeding.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, the writ should be granted and the judgment below should be reversed.

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